

STATE OF CRIMINAL DEFAMATION IN THE LIGHT OF NATIONAL AND INTERNATIONAL STANDARDS

Criminal Defamation in Azerbaijan



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Introduction

This paper analyses the law of criminal defamation in Azerbaijan Republic (hereinafter Azerbaijan), comparing it to international standards of justice and the general practice of a number of states.

Laws criminalizing defamation are not a phenomenon throughout the world today. Criminal defamation exists in the most economically developed countries such as western Europe and the United States. However, in those developed countries, these laws are usually not applied in practice.

Where criminal defamation continues to be applied means to restrict freedom of expression. In these jurisdictions, public officials and other powerful individuals use these laws as a weapon to intimidate the media from revealing corrupt practices or from publicizing incriminating information. Journalists and the media are pressured not to write or broadcast news in order to avoid a criminal law suit. This self-censorship of the media negatively affects the public's right to information.

Criminal defamation laws are just one manner of repressing freedom of expression. When criminal defamation is used, other forms of repression also exist, such as censorship, media control and intimidation. This takes the form of murder of journalists, physical harassment, imprisonment, arrangement of high amount of fine, as well as closing newspapers and stopping broadcasting. In addition, failure to diligently investigate or prosecute crimes against the media; compulsory government licensing of journalists; or the requirement that a journalist reveal anonymous sources can be used as forms of repression.

This practice is common in many countries today, particularly some of the former Soviet republics. Today, journalists live and work in quite difficult circumstances in these countries. The most widely known examples include the killing in Russia of some journalists during the past few months of 2009. They were Anastasiya Baburova , a journalist respectively for the independent newspaper Novaya Gazeta, Sergey Protazanov,

a journalist for the newspaper Grazhdanskoye, Shafiq Amrakhov, the editor of the online regional agency RIA 51,¹ as well as Natalya Estemirova, human rights defender.²

Unfortunately the same situation exists in Azerbaijan. Since 2005 the enjoyment of the freedom of expression has declined. In 2005, one journalist was killed and the perpetrators of the crime still have not been found and convicted. As a result of this impunity, many attacks, kidnappings, and physical harassments have been committed against several journalists during the last four years. In addition, tens of journalists have been arrested for defamation as well as for other criminal acts such as hooliganism, use of narcotics, etc. All these journalists have been in opposition to the government.

In this paper I will explore the ways in which criminal defamation is a gateway for the destruction of the freedom of expression and the interrelated freedom to receive information. The first chapter explains the importance of freedom of expression in a democratic society, the circumstances in which the freedom can be restricted. The first chapter will also discuss the legal doctrine of defamation, its forms and elements, and its defences. The second chapter presents the criminal defamation, comparative domestic practices and implementation mechanisms. The last chapter is devoted to the contemporary situation in Azerbaijan, including court experiences with criminal defamation. At the end, I will conclude the real and necessary measures that the Azerbaijani government must take with criminal defamation in order to improve the enjoyment of the freedom of expression.

¹ See at <http://www3.signonsandiego.com/stories/2009/sep/15/eu-russia-slain-journalists-091509/>

² See at <http://www.englishpen.org/writersinprison/bulletins/russiafourjournalistskilledin2009/>

CHAPTER 1

1.1. Freedom of expression.

Freedom of expression is a cornerstone of democratic rights and freedoms. This is the guarantee of all other rights and freedoms. Without a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy. This general proposition is undeniable.³

Freedom of expression is the most important of the rights guaranteed by all important international conventions such as the Universal Declaration of Human Rights (UDHR),⁴ the International Covenant on Civil and Political Rights (ICCPR),⁵ European Convention on Human Rights (ECHR),⁶ the American Convention on Human Rights,⁷ African Charter on Human and Peoples' Rights.⁸

The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law. It guarantees the right to freedom of expression in the following terms:

³ Jochen Abr. Frowein, “*Freedom of expression under the European Convention on Human Rights*”, in Monitor/Inf (97) 3, Council of Europe

⁴ See UDHR, Article 19

⁵ See ICCPR, Article 20

⁶ See ECHR, Article 10

⁷ See ACHR, Article 13

⁸ See ACHPR, Article 19

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR) is an international treaty, ratified by over 145 States, which imposes legally binding obligations on States Parties to respect a number of the human rights set out in the UDHR.

In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated, “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”

The European Court of Human Rights (ECtHR) has always paid crucial attention to the Right to Freedom of expression. In *Handyside v. United Kingdom* it recognized the importance of freedom of expression by stressing that this right is the foundation of a democratic society.⁹

The Court has reiterated its definitive statement at least four times since 2000.¹⁰

The guarantee of freedom of expression particularly applies to the media, including the broadcast media and public service broadcasting organizations. As the US Supreme Court has noted, “speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹¹ International Courts have considered several cases on this matter. For instance, one of its cases, the Inter-American Court of Human Rights stated: “It is the mass media that make the exercise of freedom of expression a reality”¹².

⁹ ECtHR, *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.

¹⁰ ECtHR, *Lingens v. Austria*, 1986; *Sener v. Turkey*, 2000; *Thoma v. Luxembourg*, 2001; *Maronek v. Slovakia*, 2001; *Dichand and Others v. Austria*, 2002, etc.

¹¹ *Garrison v. Louisiana* 379 US 64 (1964) at 74-5

¹² IACHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

Article 10 of the ECHR does not explicitly mention the freedom of press. However, the Court has developed extensive case-law providing a body of principals and rules granting the press, a special status in the enjoyment of freedoms contained in Article 10. The role of the press as political watchdog was first highlighted by the Court in the *Lingens case*.¹³ The Court underlined the importance of freedom of the press in the political debate:

... These principles are of particular importance as far as the press is concerned. While the press must not overstep the bounds set, inter alia, for the “protection of the reputation of others”, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader ...

In the same judgment the Court decided that:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders and consequently, the freedom of political debate is at the very core of the concept of a democratic society. This is why the Court affords political debate by the press a very strong protection under Article 10.

The ECtHR also consistently acknowledged that the press has a unique position under Article 10 ECHR. It has ruled that the press has not only a right but a duty to impart information and ideas on all matters of political and public interest, which the public has a

¹³ ECtHR, *Lingens v. Austria*, 1986; Strasbourg, France.

corresponding right to receive.¹⁴ This extends to interpretation of the facts which is not simply to be left to the reader.¹⁵ The role of the press as public watchdog is ‘essential in a democratic society’.¹⁶

This issue is paid an essential attention by Inter-American Court as well. According to Inter-American Court, freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”¹⁷

In addition, Article 2 of the ICCPR emphasize that all member states have an obligation “to adopt such laws or other measures as may be necessary to give effect to the rights” recognized in the Covenant. This article obliges states not only to refrain from interfering with rights, but also to take positive steps to ensure those rights, including freedom of expression. Thus, governments are obliged to create an environment in which an independent media can develop and satisfy the public’s right to know.

1.2. Restrictions on freedom of expression: ‘necessary in a democratic society’

Freedom of expression is not an absolute right and it can be restricted. It is envisaged in some international conventions on Human Rights. For instance, according to Article 19(3) of ICCPR:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

¹⁴ Andrew Nicol QC, Gavin Millar QC & Andrew Sharland, *Media Law & Human Rights*, Blackstone Press Limited 2001

¹⁵ ECtHR, *Sunday Times v United Kingdom* (1997) 2 EHHR 245, para. 65 and *Lingsen v Austria*, para. 41

¹⁶ ECtHR, *De Haes & Gijssels v Belgium* (1997) 25 EHRR 1, para. 37

¹⁷ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 34.

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

The similar provision is envisaged in ECHR. Article 10 (2) of ECHR also restricts the freedom of expression. Article 10 (2) says:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

According to the ECtHR's experience, the national authorities are not required to interfere with the exercise of freedom of expression every time one of the grounds enumerated by paragraph 2 is at stake, as this would lead to a limitation of the content of this right. For instance, damaging one's reputation or honor must not be seen as criminal and/or requiring civil redress in all cases. Similarly, public expression putting at risk the authority of the judiciary must not be punished each time such a criticism occurs. In other words, the public authorities have only the possibility and not the obligation to order and/or enforce a restrictive or punitive measure to the exercise of the right to freedom of expression.

Moreover, when a state restricts the freedom of expression and arranges a penalty for the expression which violates others rights or damages the security in the country, the nature and severity of the penalties are to be taken into account. In *Okcuoglu v Turkey*, the Court found that the conviction and the sentencing of the applicant were contrary to Article 10 from proportionality of the interference point of view.¹⁸ Even where the criminal penalties consisted in relatively small fines, the Court held against such penalties as they could play

¹⁸ ECtHR, *Okcuoglu v. Turkey*, 1999.

the role of an implicit censorship. In other cases where journalists were fined, the Court stressed: “...although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticism of that kind again in future. In the context of the political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its tasks as purveyor of information and public watchdog.”¹⁹

Freedom of expression can be restricted by the state in order to protect others’ honor and reputation as well. From this point of view the right to freedom of expression can be considered a problematic right due to presenting conflicts between two well-established rights: freedom of expression and the right to reputation.²⁰ The right to reputation has a much longer history than the right to freedom of expression; reputation has been highly prized and strongly protected for centuries.²¹ In most countries great importance is still attached to individual reputation, though it is less highly valued in many liberal societies, like the US. Until recently, reputation was regarded as one of the fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Both the Universal Declaration of Human Rights²² and the International Covenant on Civil and Political Rights²³ recognize the right to legal protection against attacks on individual honor and reputation, as well as against interference with privacy.

In the United States and to a lesser extend many common law jurisdictions, the clear trend in last few decades has been to give increasing protection to freedom of speech to the cost of rights or interests in reputation or privacy.²⁴ Courts have accepted, for example, that the

¹⁹ ECtHR, *Lingens v. Austria*, 1986; *Barthold v. the Federal Republic of Germany*, 1985.

²⁰ Eric Barendt, *Freedom of Speech*, Oxford University Press 2005

²¹ Reputation was protected in Roman Law

²² Universal Declaration of Human Rights, Article 12

²³ International Covenant on Civil and Political Rights, Article 17

²⁴ Eric Barendt, *Freedom of Speech*, Oxford University Press 2005

press and other media have a right to publish defamatory allegations about the conduct of politicians and other leading figures, insofar as these stories are of public interest, provided that – to simplify at this point – the media have not disclosed them irresponsibly. Equally, courts may allow the press freedom in some circumstances to disclose the details of the private lives of celebrities, taking the view that freedom of speech and of the press trumps any competing privacy rights.

The ECtHR' approach to the defamation cases differs from state to state and in some cases the Court applies the margin of appreciation. It observed, in the context of defamation, that:

...Perceptions as to what would be appropriate response by society to speech which does not ... enjoy the protection of Article 10 ... may differ greatly from one state to another...

so that contracting states enjoy a wide margin of appreciation in determining the appropriate responses.²⁵ These may include measures allowing the courts to enforce 'right to reply'. In *Ediciones Tiempo SA v Spain*,²⁶ the Commission emphasized that 'in a democratic society the right of reply is a guarantee of the pluralism of information which must be respected'. In the same case the Court observed that: *... the purpose of the regulations governing the right of reply was to safeguard the interest of the public in receiving information from variety of sources and thereby to guarantee the fullest possible access to information...*

The Court has also consistently referred to the theoretical basis for the protection of freedom of expression articulated in *Handyside v UK*,²⁷ in the context of restrictions and penalties in the law of defamation, namely that:

... freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for

²⁵ ECtHR, *Tolstoy Molivslavsky v UK*, 1995, 20 EHRR 442, para. 48

²⁶ ECtHR, *Ediciones Tiempo SA v Spain*, 1989

²⁷ ECtHR, *Handyside v UK*, 1976

its progress and for each individual's self-fulfillment. Subject to paragraph 2, it is applicable not only 'information' or 'ideas' that are favorably received or regarded as inoffensive or a matter of indifference, but also those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'

Because of this the 'necessity for any restrictions to be convincingly established' has been restated a number of times in the context of defamation.²⁸

1.3.1. What is Defamation?

There are different notions on defamation. In general, the definition of defamation varies from jurisdiction to jurisdiction, but "one of the common agreements that a communication that is merely unflattering, annoying, irksome, or embarrassing, or that hurts only the plaintiff's feelings, is not actionable."²⁹

Another common direction is that defamatory allegation is one that tends to make reasonable people think the worse of the plaintiff.³⁰ Other definitions refer to "words which cause a person to be shunned and avoided".³¹ This would include allegations which carry no moral blame but which might make people avoid the plaintiff. For instance, in *Youssupoff v. MGM Pictures Ltd*,³² Court of Appeal held that the plaintiff was raped was defamatory because it would prejudice her chances of "receiving respectable consideration from the world". The concept of defamation by exposure to "ridicule", from the least satisfactory definition of "hatred, ridicule and contempt" has received the approval of the Court of Appeal.³³

²⁸ ECtHR, *Lingens v Austria*, 1986

²⁹ Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems 2-9* (1999).

³⁰ *Sim v. Stretch* (1936) 52 T.L.R. 669. *Tolley v. J.S. Fry and Sons LTD* (1931) A.C. 333

³¹ *Id.*

³² *Youssupoff v. MGM Pictures Ltd* (1934) 50 T.L.R. 581, UK

³³ David Price *Law, Procedure & Practice* London Sweet & Maxwell 1997

In general, defamation is a public communication that tends to injure the reputation of another. It has been treated by the modern law as of two kinds: written and oral. In most cases written defamation is called libel, and oral defamation is called slander. According to some authors,³⁴ the use of the term slander is not, etymologically correct, in accordance with ancient authorities; but the distinction itself is unknown in the old books and abridgments; and it is more convenient to give to written defamation and spoken defamation those arbitrary titles which usage has now fully established.

Defamation, in the Common Law world is a civil wrong or tort. It is a special sort of wrong in that it does not need to involve the threat or actuality of any physical harm being suffered by the victim. It is a tort which occurs where A says to another or others, something about B which is false and derogatory and which does harm B's reputation. Defamation is a wrong for which virtually all legal systems provide redress. Generally this redress is available through private law actions taken by whoever claims they have been defamed. Defamation can also be a crime, as well as being a civil wrong.³⁵

1.3.1. a. English defamation law

Modern libel and slander laws as implemented in many (but not all) Commonwealth nations as well as in the United States and in the Republic of Ireland, are originally descended from English defamation law.

It is not easy to explain or understand the English common law of defamation.³⁶ As a leading U.K. commentator stated, "the law of defamation is notoriously complex." Its complexity comes from numerous detailed and technical rules, which stem from the

³⁴ George Wingrove Cooke, ESQ., *Law of Defamation: with forms of pleadings*, Philadelphia: T. & J. W. Johnson

³⁵ H.L.Fu, Richard Cullen *Media Law in PRC Asia Law & Practice* 1992

³⁶ Weaver, Russell L. and others, *Defamation law and free speech: Reynolds v. Times Newspapers and the English media*, Vanderbilt Journal of Transnational Law, November 1, 2004

common law as well as from recent developments. In addition, the English common law of defamation was altered by the 1952 Defamation Act and the 1996 Defamation Act, as well as by the European Convention on Human Rights and Fundamental Freedoms, which has been incorporated into U.K. law through the 1998 Human Rights Act.

Until recently English common law refused to recognize a defense of qualified privilege to defamation actions³⁷ brought in respect of communications to the general public of inaccurate information.

1.3.1. b. The United States defamation law

Until the landmark ruling in *New York Times v Sullivan*,³⁸ the United States Supreme Court's view on defamation was that an attack on an individual's reputation did not contribute to public discussion, but was rather to be equated with an assault.³⁹ A defamatory attack on the conduct of a public official – an Alabama Commissioner of police – was held to be a form of political speech, the protection of which is the principal concern of the First Amendment.⁴⁰ As a result, the claimant could not bring a libel action unless malice was proved. The crucial step in the Court's reasoning was the analogy drawn between this type of libel and the offence of sedition, which, in the Court's view, would

³⁷ See Chapter 1.3.6.(e)2.

³⁸ 376 US 254 (1964) (Sullivan was a police commissioner in Montgomery County, in Alabama. He sued the New York Times after it published an advertisement charging that his police department had violated the civil rights of many black people in its jurisdiction at the height of civil rights movement in the US. Sullivan was not identified by name in the advertisement.)

³⁹ *Chaplinsky v New Hampshire* 315 US 568 (1942)

⁴⁰ The First Amendment of the United States Constitution protects the right to freedom of religion and freedom of expression from government interference. See U.S. Const. amend. I. Freedom of expression consists of the rights to freedom of speech, press, assembly and to petition the government for a redress of grievances, and the implied rights of association and belief. The Supreme Court interprets the extent of the protection afforded to these rights. The First Amendment has been interpreted by the Court as applying to the entire federal government even though it is only expressly applicable to Congress. Furthermore, the Court has interpreted, the due process clause of the Fourteenth Amendment as protecting the rights in the First Amendment from interference by state governments. See U.S. Const. amend. XIV.

clearly be outlawed by the Amendment. If that analogy were correct, it would inevitably follow that at least some libels are covered by a free speech clause.⁴¹ Consequently, in deciding where the balance should lie between allowing persons to protect their reputation and protecting rights of freedom of expression and freedom of the press, the First Amendment was invoked to argue that that balance must favour freedom of the press.

The *New York Times* case and subsequent cases have established that public officers (widely defined) and public figures (for example, film stars), who are engaged in public or official activities (or activities relevant to those activities), can only sue successfully in defamation if they can prove both actual damage and actual malice with convincing clarity.⁴² In fact it is almost impossible for most public officials and public figures to obtain a remedy in a defamation action in the US. This is the case even when the published statement contains false facts. Factual falsity does not found a cause of action unless the person publishing the statement knew the facts were false or showed reckless disregard as to whether they were false or not. Mere failure to investigate the truth of the statement is not enough to establish malice.⁴³

Several arguments have been put forward to justify this dramatic change in the law. First, it is said that public officials and public figures assume the risk of unfavorable publicity when they decide to enter the limelight. Second, it is said that it is better for free speech to be over protected in order to assure it is not under protected. Third, the press is said to enjoy a unique position in a democracy which deserves special protection.⁴⁴

Defamation actions are available in the US under the usual rules for those who are not public officials or public figures. Those in the latter categories must live with the reality

⁴¹ Eric Barendt, *Freedom of Speech*, Oxford University Press 2005

⁴² Scauer, Fredrick, "Social Foundations of the Law of Defamation: A comparative Analysis", in (Barendt, Eric. (ed) Media Law (Dartmouth, Aldershot, 1993) 264

⁴³ Id.

⁴⁴ Id 268 and 278

that the media enjoys an especially privileged position in the US. The outcome of the *New York Times case* and those following it buttress the clearly identified role of the media as the fourth branch of government in the US.

1.3.2. Slander and Libel

There are two distinct forms of defamation: libel and slander. Libel is the publication of defamatory matter in permanent form. Most commonly, but not exclusively, libel is in writing and slander is spoken. According to the section 1 of the 1952 English Defamation Act, defamatory broadcasts are treated a libel.⁴⁵ The same provision is constituted with respect to performances on stage by virtue of section 4(1) Theatres act 1968. Films, records and tapes are all considered to be in permanent form. Most publications on electronic media, such as the internet and e-mail have sufficient permanence to be considered libel. Even though the words appear on a screen they are not stored, in which case it is likely to be considered a slander.⁴⁶

Defamatory matter communicated by word of mouth is slander except, arguably, when the speaker is reciting from a document.⁴⁷ Defamatory gestures and conduct are slanders.

In slander actions there is an additional burden on the plaintiff which reflects the fact that the libel is more durable and therefore more likely to damage reputation.

1.3.3. Elements of Defamation

Broadly there are four elements that the plaintiff is required to prove in a defamation lawsuit, whether for libel or slander. These are as follows:

1. The statement, which must be about another person, must be false.

⁴⁵ See Defamation act 1952, Section 1

⁴⁶ David Price *Law, Procedure & Practice* London Sweet & Maxwell 1997

⁴⁷ *Longdon-Griffiths v. Smith* (1950), *Osborn v. Thomas Boulter* (1930)

2. The statement must be ‘published’ to a third party, who cannot also be the person who is being defamed. Publishing in this context does not mean that it must be printed, but purely that the statement has to be ‘made available’ to someone other than the person about whom the statement was made.
3. If the nature of the statement is ‘of public concern’ the person who has published it must be at least liable in negligence.
4. The person about whom the defamatory statement is made must be ‘damaged’ by the statement. In some states, it is sufficient to establish that the plaintiff suffered ‘mental anguish’ as opposed to ‘damage.’⁴⁸

Defamation per se

Some statements are so defamatory that they are considered defamation *per se*; and the plaintiff does not have to prove that the statements harmed his reputation. The classic examples of defamation *per se* are allegations of serious sexual misconduct; allegations of serious criminal misbehavior; or allegations that a person is afflicted with a loathsome disease. The historical examples of loathsome diseases are leprosy and venereal diseases. When a plaintiff is able to prove defamation *per se*, damages are presumed, but the presumption is rebuttable.

Typically, the following may constitute defamation per se:⁴⁹

- Attacks on a person's professional character or standing;
- Allegations that an unmarried person is unchaste;
- Allegations that a person is infected with a sexually transmitted disease;
- Allegations that the person has committed a crime of moral turpitude;

⁴⁸ H.L.Fu, Richard Cullen, *Media Law in PRC*, Asia Law & Practice 1992

⁴⁹ Larson, Aaron, *Defamation, Libel and Slander Law*, Law Offices of Aaron Larson, August, 2003, published in: http://www.expertlaw.com/library/personal_injury/defamation.html

1.3.4. The defamatory statement: What the plaintiff must prove

The consideration of the meaning of the statement is one of the most important issues of the defamation. The statement or publication which is the subject of a defamation action will consist of words, be they may be written, spoken, broadcast or transmitted electronically. Words are the essence of defamation and the plaintiff must in his statement of claim set out the words of which he complains. Where the plaintiff is unable to ascertain the words with reasonable precision his action will fail. The difficulty of words is that they can mean different things to different people and the context and manner in which they are published will affect the meaning.⁵⁰

However, words which merely cause injured feelings or annoyance but do not reflect on reputation are not defamatory. A person may be upset to hear that he or she has died but it is not defamatory.⁵¹ To use a person's name without his or her authority for the purpose of an advert is not of itself defamatory, although it may give rise to liability in overtaking.⁵²

In order to establish a cause of action in defamation, a plaintiff must prove that the defendant has published or is responsible for the publication of defamatory material which is understood to refer to him. Publication is an essential ingredient of defamation.⁵³ However defamatory a person's thoughts may be, they will cause no damage to anyone's reputation unless communicated to another. In deciding where something is published there is a distinction to be made between the act of publication and the fact of communication to a third party, but even that distinction may not suffice to reveal all the considerations relevant to locate the place of the tort of defamation.⁵⁴ Whether or not a case can be

⁵⁰ Price, David, *Law, Procedure & Practice*, London Sweet & Maxwell 1997

⁵¹ *Samules v. Evening Mail* (1875) 6, Hun. (N.Y.) R.5.

⁵² Price, David, *Law, Procedure & Practice*, London Sweet & Maxwell 1997

⁵³ Mathias Klang and Andrew Murray *Human Rights in the Digital Age*, 2005, p 61

⁵⁴ *Dow Jones & Co v Cutnick* [2002] HCA 56, para. 11

brought in a particular jurisdiction will depend, inter alia, on where the damage occurs and also whether there has been a publication in that state.⁵⁵

According to English defamation law there is no obligation on the plaintiff to prove the allegation is false in order to establish a cause of action in defamation. However, he or she must nevertheless anticipate the evidence on which he or she could rely in order to demonstrate its falsity if there is a prospect that the defendant will seek to prove that it is true. Similarly, the plaintiff needs not prove that the defendant was malicious in order to establish that he or she has been defamed. But, where the defendant proves that the publication is fair comment or was made on an occasion of qualified privilege, the plaintiff must prove malice⁵⁶ in order to defeat the defense and win the action. Finally, when the plaintiff technically has a cause of action and there is no defense, if the action lacks any real merit, it may not be worth pursuing.⁵⁷

Defamation law in the United States is much less plaintiff-friendly than its counterparts in European and the Commonwealth countries, due to the enforcement of the First Amendment.⁵⁸ Criminal libel is rarely prosecuted but exists on the books in many states, and is constitutionally permitted in circumstances essentially identical to those where civil libels liability is constitutional. Defenses to libel that can result in dismissal before trial include the statement being one of opinion rather than fact or being “fair comment and criticism,” though neither of these are imperatives on the US constitution. Truth is currently almost always a defense.

⁵⁵ *Shevill and Others v Presse Alliance SA* [1995] All ER (EC) 289

⁵⁶ Malice is a term of art meaning a dominant improper motive. In order to establish malice it is generally necessary to demonstrate that the defendant published the statement knowing it to be false or without caring whether it was true or false, i.e. recklessly.

⁵⁷ *Id* p: 4

⁵⁸ See para. 1.3.1.a.

Most states recognize that some categories of statements are considered to be defamatory *per se*, such that people making a defamation claim for these statements do not need to prove that the statement was defamatory.

1.3.5. Defenses to Defamation

In defamation cases it is important to take into consideration not only the four elements of defamation that must be proven, but also be prepared for the defenses that may be used to dismiss a case. According to David Price,⁵⁹ the defendant must overcome four hurdles in order to establish the defense:

1. the statement must be comment but not fact;
2. the comment must have a sufficient factual basis (that is the comment must be based on facts which are themselves true);
3. the comment must be one which a “fair minded” man could honestly hold. This is an objective test;
4. the subject matter of the comment must be a matter of public interest.

Where these are surmounted, the defense will succeed unless the plaintiff proves that the comment was maliciously published.

In general, the following forms of defense have been differed:

(a) Justification.

A claim of defamation is defeated if the defendant proves that the statement was true. If the defense fails, a court may treat any material produced by the defense to substantiate it, and any ensuing media coverage, as factors aggravating the libel and increasing the damages. A

⁵⁹ David Price *Law, Procedure & Practice* London Sweet & Maxwell 1997

statement quoting another person cannot be justified merely by proving that the other person had also made the statement: the substance of the allegation must be proved.⁶⁰

(b) Fair Comment

According to some authors,⁶¹ the defamatory statement is an opinion, based on true facts, which an honest person could hold in relation to a matter of public interest. A comment made which though defamatory is not actionable as it is an opinion on a matter of public interest. The fact that the opinion is exaggerated, prejudiced, obstinate, and wrong is not a bar to the defense succeeding. The liberty of the defense is justified on the basis that readers can recognize an opinion as the subjective view of the publisher or author and make up their own mind about whether to accept it.⁶² Statements of the fact, in contrast, are considered more damaging because they are more likely to be accepted at face value. Different authors have given different definition to fair comments. According to some authors,⁶³ "... a defense to an action of libel or slander that the words complained of is fair comment on a matter of public interest. The right of fair comment is one of the fundamental rights of free speech and writing .. and it is of vital importance to the rule of law on which we depend for our personal freedom. The right is a bulwark of free speech. ... There are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters, it is desirable that all should be able to comment freely and even harshly, so long as they do so honestly and without malice." In Canadian Law,⁶⁴ author R. Brown stresses the following trends: "Everyone is entitled to comment fairly on matters of public interest. ... Such comments are protected by a qualified privilege if they are found to be comments and not statements of fact, and are made honestly, and in good faith, about facts which are true on a matter of public interest. A comment is the subjective expression of opinion in the form of a deduction, inference,

⁶⁰ "Defamation - libel and slander". *The Liberty Guide to Human Rights*. Liberty. 2002-10-21.

⁶¹ Price, David, *Defamation, Law, Procedure & Practice*, London, Sweet and Maxwell 1997

⁶² *Kemsley v. Foot*, 1952, A.C. 345, Lord of House, The United Kingdom

⁶³ Price, David, *Defamation, Law, Procedure & Practice*, London, Sweet and Maxwell 1997

⁶⁴ Brown, R., *The Law of Defamation in Canada*, Toronto: Carswell, 2007

conclusion, criticism, judgment, remark or observation which is generally incapable of proof. In order to be fair, it must be shown that the facts upon which the comment is based are truly stated and that the comment is an honest expression of the publisher's opinion relating to those facts. Where a comment imputes evil, base or corrupt motives to a person, it must be shown that such imputations are warranted by, and could reasonably be drawn from those facts. ... The comment must be made on a matter of public interest. It could be of public interest because of the importance of the person about whom the comment is made, or because of the event, occasion or circumstances that give rise to the opinion. The protection may be lost if it is shown that the comment was made maliciously, in the sense that it originated from some improper or indirect motive, or if there was no reasonable relationship between the comment that was made and the public interest that it was designed to serve. ... it is a defense to an action for libel or slander if the words used are fair comment on a matter of public interest."

Lord Denning, in *London Artists Ltd. v. Littler*,⁶⁵ added: "In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter."

In *Makow v Winnipeg Sun*,⁶⁶ Justice Monnin wrote: "Everyone has a right to comment on matters of public interest provided he does so fairly and honestly and such comment, however severe, is not actionable. ... In order to be successful, the defendants must meet the following criteria: the words objected to must be comment and not statement of fact; the comment must be fair; (and) the comment must be on a matter of public interest."

⁶⁵ *London Artists v Littler* 1969 2 QB 375 (England)

⁶⁶ *Makow v Winnipeg Sun* 2003 MBQB 56, published at canlii.org/en/mb/mbqb/doc/2003/2003mbqb56/2003mbqb56.html; appeal at canlii.org/en/mb/mbca/doc/2004/2004mbca41/2004mbca41.html

In *Creative Salmon Co. v Staniford*,⁶⁷ Justice Gerow states these words: “To be fair, a comment must be based on facts truly stated and must not contain imputations of corrupt or dishonorable motives on the person whose conduct is criticized, save insofar as such imputations are warranted by the facts. Another necessary ingredient of the defense of fair comment is that the person making the statement must have an honest belief in the truth of the comment. ... The onus is on Mr. Staniford (the Defendant) to prove that the statements were made honestly and fairly. In order to do so, he must satisfy both a subjective and objective test: subjective honesty of belief in the defamatory statement, that is, the comment is one which a fair minded person would honestly make on the facts proved; and objective fairness, in the sense that the comment is one which a person could honestly make on the basis of all the facts known to the defendant.”

(c) Unintentional Defamation

In cases of unintentional and non-negligent defamations, a defendant may avoid liability to pay damages if he is willing to publish a reasonable correction and apology and to pay the plaintiff's costs and expenses reasonably incurred as a consequence of the publication in question (e.g. costs of consulting a solicitor, obtaining Counsel's opinion etc.)⁶⁸

(d) Privileges

The law of defamation must balance the competing interests of freedom of speech and protection of reputation. There is no difficulty where the publication in question is true – freedom to disseminate the truth must outweigh the protection of an undeserved reputation. However, in certain circumstances, the law recognizes that it is better that individuals are free to speak their mind (and others to report what they say) without fear of

⁶⁷ *Creative Salmon Company Ltd. v. Staniford*, 2007 BCSC 62, published at canlii.org/en/bc/bcsc/doc/2007/2007bcsc62/2007bcsc62.html

⁶⁸ David Price *Law, Procedure & Practice* London Sweet & Maxwell 1997

being sued even if they get it wrong and the plaintiff's reputation is damaged. This is the rationale behind the defense of privilege.⁶⁹

(d) 1. Absolute privilege

An absolute privilege protects the speaker or publisher from any liability for defamation; the privilege is also referred to as “absolute immunity” because the speaker is immunized from liability. The doctrine of absolute privilege arose from the theory that there are certain circumstances in which the ability to speak freely — usually in the context of governmental functions — is so important that it outweighs the interest that an individual has in his or her reputation. There can be no investigation into whether remarks made in a situation of absolute privilege are defamatory. The purpose of the absolute privilege is to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by actions imputing to them dishonesty and malice. There are three broad common law categories of absolute privilege: statements made in the course of judicial or quasi-judicial proceedings; statements made in the course of parliamentary proceedings; and communications concerning matters of state.

If the defendant's comments were made in Parliament, or under oath in a court of law, they are entitled to absolute privilege.

The recognized core of absolute privilege applies to everything that is said in a judicial proceeding by witnesses, prosecutors and by judges. Absolute privilege attaches to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, with such protection extending to the contents of documents submitted as evidence.⁷⁰ In this regard, it is said that words “spoken in office ... in the course of any proceedings before any court recognized by law ... though the words were written or spoken maliciously, without any justification or excuse, and from personal ill-will or anger

⁶⁹ Id.

⁷⁰ *Lincoln v Daniels*, 1962, UK

against the party defamed”⁷¹ are not subject to an action in defamation. Secondly, absolute privilege extends to everything that is done from the inception of the proceedings onwards, and includes all pleadings and other documents brought into existence for the purpose of the proceedings.

It is essential to the ends of justice that all persons participating in judicial proceedings should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences. It is desirable that persons who occupy certain positions, as judges, jurors, advocates, or litigants, should be perfectly free and independent, and that to secure their independence, their utterances should not be brought before civil tribunals for inquiry on the mere allegation that they are malicious.

(d) 2. Qualified privilege

Statements or publications protected by qualified privilege can be broadly divided into two categories:

1. where the statement in question is (a) made by a person who has (i) “a duty” to make a statement or (ii) “an interest” in making the statement; and (b) the recipient or recipients of the statement (“the publishees”) have a duty or interest in receiving it.
2. Fair and accurate reports of certain proceedings, documents and statements.

The duty or interest which generates qualified privilege may be legal, commercial, social or moral. These concepts are merely a way of identifying circumstances where it is felt to be in the public interest that defendants should be free to speak their mind, even if they publish false and defamatory statements.⁷²

⁷¹ *Royal Aquarium and Summer and Winter Garden Society v Parkinson*, 1892, UK

⁷² David Price *Law, Procedure & Practice* London Sweet & Maxwell 1997

(e) Fact or Opinion

In many cases the distinction between a statement of fact and opinion is difficult. In characterizing a statement, courts must look at it not as lawyers and judges but by placing themselves in the position of the hearer or reader, and determine the sense or meaning of the statement according to its natural and popular construction. In short, the measure is not the effect of the statement on a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.⁷³ Accordingly, what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole.⁷⁴

To determine whether an alleged defamatory statement is one of fact or of opinion it is necessary to find out first, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. Where the language of the statement is ‘cautiously phrased in terms of apparency,’ the statement is less likely to be reasonably understood as a statement of fact rather than opinion. Next, the context in which the statement was made must be considered. Since a word is not a crystal, transparent and unchanged, but is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used, the facts surrounding the publication must also be carefully considered.

From this point of view, the courts are to look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. The publication in question must be considered in its entirety; ‘it may not be divided into segments and each portion treated as a separate unit. It must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader, and construed in the light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning which

⁷³ California Supreme Court, *Baker v. Los Angeles Herald Examiner*, 1986

⁷⁴ United States Court of Appeals, *Gregory v. McDonnell Douglas Corp.*, 1976

may have been fairly presumed to have been conveyed to those who read it. If the publication so construed is not reasonably susceptible of a defamatory meaning and cannot be reasonably understood in the defamatory sense, the statement is not actionable.⁷⁵

It is important that careful distinction be drawn between expression in the form of statements of facts and the expression of value judgment or opinion. This is because the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof.⁷⁶ This makes it difficult, or sometimes impossible, for a journalist to defend himself if this is the test of legality.⁷⁷ However it is not always impossible to determine the distinction and this distinction is important in order to make a decision. The cases show that a penalty imposed for expressing an honest value judgment is likely to involve the violation of the right to freedom of expression. This practice has been observed in numerous cases of the ECtHR. For instance in the case of *Schwabe v Austria*, the Court found a violation of Article 10 of the ECHR, holding that the comparison essentially amounted to a value judgment made in good faith which had not exceeded the limits of freedom of expression.⁷⁸ Although the classification of the statement as fact or opinion is a matter which comes within the margin of appreciation, the Court has decided cases on its own classification of the material.⁷⁹ Where the statement is considered to be fact, the journalist must be permitted to call relevant evidence to try to prove truth.⁸⁰

However, it does not mean that Article 10 (2) ECHR can never be successfully invoked where there has been a defamatory comment which damages a person's reputation.⁸¹ There

⁷⁵ California Supreme Court, *Baker v. Los Angeles Herald Examiner*, 1986

⁷⁶ Nicole, Andrew QC, Millat Gavin QC & Sharland Andrew, *Media Law and Human Rights*, Blackstone Press Limited 2001

⁷⁷ ECtHR, *Lingens v Austria*, 1986

⁷⁸ ECtHR, *Schwabe v Austria*, 1992, para. 34

⁷⁹ ECtHR, *Prager & Oberschlick v Austria*, 1995, para. 36

⁸⁰ ECtHR, *Castells v Spain*, 1992, para. 48

⁸¹ Nicole, Andrew QC, Millat Gavin QC & Sharland Andrew, *Media Law and Human Rights*, Blackstone Press Limited 2001

must still be some established or undisputed factual basis for the expression of the opinion, which must be a good faith.⁸² In *Prager & Oberschlick v Austria*, the Court was satisfied that the journalists had overstepped the mark by reason of the width of their accusations which lacked a sufficient factual basis.⁸³ The interference in the form of convictions for criminal defamation was not, in this case, considered disproportionate. However, there is undoubtedly more scope for a journalist to attack through the expression of opinion.

In defamation actions it's a general rule that no remedy can be had for a statement that was issued in the form of an opinion. In the case of *Rose v. Hollinger International, Inc.*⁸⁴ the trial court dismissed the defamation count, holding the allegedly libelous statements in the e-mail were protected expressions of opinion.⁸⁵

⁸² ECtHR, *Lingens v Austria*, 1986, para. 46 and *De Haes & Gijels v Belgium*, 1997, para. 47

⁸³ ECtHR, *Prager & Oberschlick v Austria*, 1995, para. 37

⁸⁴ Appeal from the Circuit Court of Cook County, *Rose v. Hollinger International*, May 19, 2008

⁸⁵ After a short stint with the *Chicago Sun-Times*, Thomas Rose in 1998 became the publisher and chief executive officer of the *Post*, an affiliate of the Chicago newspaper. He moved to Israel and worked in that position until he was fired on May 25, 2004. Two days later, Bret Stephens, the paper's editor-in-chief, e-mailed the editorial staff about the firing. His message read in part: "For those of us who have seen up close the damage Tom did to this newspaper, this is a happy event indeed. For those Tom damaged personally, with his abusive behavior and bizarre management style, it is happier still. So good riddance, Tom, good riddance. You will not be missed.

"So many of us have been waiting for this day, and fighting for it, that we may be forgiven for thinking that Tom's departure brings our problems to an end. It does not. It will be some time before we can undo the damage he has wrought: To our finances, to our reputation, to our business relationships, to our morale, to the quality of our editorial product.

"What we can say is that, with Tom gone, we can begin to address our problems in a rational and purposeful way. ..."

Not surprisingly, *Jerusalem Post* employees forwarded the e-mail to others, and parts of it eventually were published in at least two newspapers. Rose then sued Stephens, the *Post*, its publisher (Hollinger International Inc.) and Chicago Sun-Times Inc., under a variety of theories, including defamation.

In *Rose*, the court affirmed a trial court's dismissal of a former employee's libel claim against the publisher of *The Jerusalem Post* on the grounds that the blistering e-mail announcing the employee's departure was protected opinion.

(f) Public interest

The condition of public interest, the topic is a matter of public interest is also important matter of defense in defamation cases. This means that the subject is one in which the public has a reasonable interest - in other words, a right to know.

This right to know includes matters which are in the public arena, but it does not cover matters which are the purely private concerns of an individual. For example, one can comment on the way a politician was elected, how he does his job or how he treats his staff. But the courts have ruled that the way he treats his wife in the privacy of their home is not in the public arena. (You can, of course, report that he beats his wife, but you must use another defence, such as truth, against any possible action for defamation.)

There is a word of warning; however, in some countries, the law states that fair comment can be used as a defence only on "matters in the public interest". This means that the public must also benefit from knowing the comment. This is very difficult to prove and therefore very limiting to journalists.

(g) A correction and apology

This is not, strictly speaking, a defense. In fact, publication of an apology is an admission that a mistake has been made and that it was defamatory. However, if a judge or jury later finds that the matter was defamatory, the fact that there was a quick apology and correction the mistake will mitigate the finding.

Extreme care should be taken in writing a correction and apology. It is possible, when correcting one defamatory statement, to make another. For example, to say that allegations

contained in a speech by Mr. Alfa about Mr. Beta were untrue could be calling Mr. Alfa a liar.

Conclusion

As it is mentioned above, the freedom of expression is not an absolute right and it can be restricted in particular circumstances. Free expression can be a defamatory and in case of defame, a person who has a defamatory statement must be punished. However, a state should take into consideration the above mentioned cases. It means, in particular cases, a defamatory statement is allowed within limits and punishment of authors for some defamatory statements can be violation of the right to freedom of expression and harm the democracy itself.

CHAPTER 2

2.1. Criminal Defamation

There are two forms of defamation laws; Criminal defamation law, and civil defamation law. Criminal suits for defamation to remedy damage to a person's honor and reputation should be deemed to be unnecessary in all cases. Civil law suits for defamation combined with the right to reply can provide *restitutio integrum* (full restitution) to victims. Civil defamation suits are adjudicated between the parties in civil courts, whereas criminal defamation suits are prosecuted by the State as criminal offenses. Otherwise, the primary distinction between civil and criminal defamation is in the remedies awarded. The victim's remedy in a civil defamation suit is compensatory damages and perhaps punitive damages. A problem that may arise in a civil defamation suit is the award of disproportionate damages.⁸⁶ The formal remedy in criminal libel is incarceration or the payment of a fine to the government. A civil defamation suit is less stigmatizing, but stigma and punishment are often what the alleged victim is seeking.⁸⁷ Furthermore, civil defamation suits are not as problematic as criminal defamation suits. In civil suits, there is no potential for prosecutorial misconduct. As criminal prosecutors exercise considerable discretion in determining which complaints to prosecute, criminal defamation laws may be inconsistently enforced, and enforcement may be politically motivated, especially when the alleged victim of the statement is a public official or influential person.

⁸⁶ *Stokes v. Jamaica*, Case 28/04, Inter-Am. C.H.R., Report No. 65/04, EA/Ser.L/V/II.122, doc. 5 rev. 1 at 396 (2004).

⁸⁷ Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 *Comm. L. & Pol'y* 433, 470 (2004).

2.2 History of Criminal Defamation

The roots of modern criminal libel law can be traced to the Roman Empire, where the offense could be punished by death.⁸⁸ By the thirteenth century, an English statute, *De Scandalis Magnatum* (1275, 3 Edw. 1, Stat. West. Prim. C. 34), threatened those who “told or published any false News or Tales” with imprisonment. The infamous Court of Star Chamber developed common law criminal libel rules in 1488, contemporaneously with the development of the printing press. Although originally intended primarily to protect the monarchy or the aristocracy from criticism or insult, criminal libel laws also applied to nonpolitical defamatory statements about private persons.⁸⁹

The law governing criminal prosecutions for defamation in England today was enacted in 1792. Later it was enforced in the American colonies. Many of the U.S. state laws were initially enacted in the early to mid-1800s. Meanwhile, in Europe, laws such as the French press law of 1881 created criminal penalties for harming the reputation of an individual, as well as for insulting the President, judiciary, and others within government. Many countries which follow the civil code model adopted similar statutes.⁹⁰ The rationale supporting criminal libel seems counterintuitive to modern sensibilities. At its heart, criminal libel was believed to be an essential weapon to avert breaches of the peace, by dueling or vigilantism, by those who sought satisfaction for affronts to their honor or dignity. “Defamation, either real or supposed, is the cause of most of those combats which no laws have yet been able to suppress.”⁹¹

⁸⁸ Yanchukova, Elena, “Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions,” 41 *Colum. J. Transnat’l L.* 861 (2003).

⁸⁹ *De Libellis Famosis*, 5 Coke 125a, 77 Eng. Rep. 250, 251, *cited in* MLRC Bulletin, “Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan and Garrison,” at 1 (March 2003).

⁹⁰ Yanchukova, *supra* note 1, at 863.

⁹¹ Livingston, Edward, “A System of Penal Law for the State of Louisiana,” (1833), *cited in* *Garrison v. Louisiana*, 379 U.S. 64, at 68 (1964).

Today laws criminalizing defamation are not uncommon throughout the world. Even some western European countries as well as some U.S. states still have criminal defamation laws. Although they are seldom used, criminal defamation statutes remain on the books in about half of U.S. states as well as western European countries.⁹² In jurisdiction where it is still enforced, public officials and other powerful individuals can use these laws as a weapon to intimidate the media from revealing corrupt practices or publicizing incriminating information. Journalists and the media may be pressured not to write or broadcast news because its publication could result in a criminal law suit. This self-censorship of the media negatively affects the public's right to information.⁹³

2.3. The United States of America's Experience of Criminal Defamation

The trial of printer John Peter Zenger was the most famous criminal libel prosecution in colonial America. Zenger had printed issues of the *New York Weekly Journal* which criticized the colonial governor for removing the Chief Justice after he ruled against him. The jury, urged on by Zenger's lawyer, Andrew Hamilton, disregarded the presiding judge's admonition that the truth of the assertion was no defense to the charge, and acquitted Zenger.⁹⁴ After independence, the Sedition Act of 1798 made it a federal crime to publish false, scandalous and malicious writings about the government, Congress, or the President. Although the Act expired in 1801, it was not until 1964, in *New York Times v. Sullivan*. As Justice William Brennan wrote, the need for citizens to be informed in a democratic nation is based on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include

⁹² John D. Zelezny, *Communications Law: Liberties, Restraints, and the Modern Media* 116 (4th ed. 2004).

⁹³ Jo M. Pasqualucci, *Criminal Defamation and the evolution of the doctrine of freedom of expression in international law: comparative jurisprudence of the Inter-American Court of Human Rights*, *Vanderbilt Journal of Transnational Law*, March 2006.

⁹⁴ Jane E. Kirtley and others, *Criminal Defamation: An "Instrument of Destruction"*, Minneapolis, Minnesota, USA November 18, 2003

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁹⁵

Yet in the same term, the high court declined to rule that all criminal defamation statutes were necessarily unconstitutional. In *Garrison v. Louisiana*,⁹⁶ the Supreme Court struck down the Louisiana criminal libel statute because it limited the use of truth as a defense, and did not require that actual malice – knowledge of falsity, or reckless disregard for the truth – be demonstrated, as required in civil cases by *Sullivan*. Yet Justice Brennan, again writing for the Court, acknowledged that “different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned.”⁹⁷ Accordingly, the individual states remained free to retain or enact criminal libel laws as long as the statutes conform with these constitutional requirements. In the decades following *Garrison*, sixteen states, and the District of Columbia, repealed their criminal libel statutes.⁹⁸ Courts in other states subsequently struck down the laws on constitutional or other grounds. As a result, only 17 of 50 states retain criminal libel statutes. In most of those jurisdictions, the laws are either limited to private libels, or remain “on the books,” but effectively dormant.⁹⁹

In general, in many commonwealth and common law countries, prosecutions for criminal libel are rare. There have been hardly any prosecutions in England, Wales and Northern Ireland in recent years, and in Scotland, there is no criminal libel.¹⁰⁰

2.4. The Inter-American Court's Jurisprudence on Criminal Defamation

⁹⁵ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁹⁶ 379 U.S. 64 (1964).

⁹⁷ *Id.* at 72, n. 8.

⁹⁸ MLRC Bulletin, *supra* note 2, at 12.

⁹⁹ *Id.* at 15.

¹⁰⁰ Nichol, Andrew, “The United Kingdom” in *Press Law and Practice*, Article 19, London 1993, updated by letter of 26 January 1998.

The Inter-American Court got positive results in the area of criminal defamation in 2005. The Inter-American Court decided three criminal defamation cases in which the applicant had been convicted in domestic courts of defaming a public official or person who was involved in activities of public interest.¹⁰¹ The Court ruled in each case that criminal defamation was not the least restrictive means of limiting freedom of expression so as to protect other rights and, therefore, the State had violated the rights of the person convicted domestically of criminal defamation.¹⁰² In *Herrera Ulloa v. Costa Rica*, also known as *La Nación Newspaper Case* the Court held that requiring a journalist to prove the truth of statements made by third parties was an excessive restriction on the journalist's right to freedom of expression,¹⁰³ and that there is a higher standard of protection for statements made about persons whose activities are within the domain of public interest.¹⁰⁴

In *Canese v. Paraguay*, the Inter-American Court stated that “penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct.”¹⁰⁵ When combined with the Court's statements that the least restrictive means of interference with freedom of expression must be used,¹⁰⁶ and that a criminal proceeding combined with other factors constitutes “an unnecessary and excessive punishment” for statements made in the context of a campaign for election,¹⁰⁷ one can infer that criminal sanctions for defamation

¹⁰¹ *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, (Aug. 31, 2004); *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, (Jul. 2, 2004); *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R.

(ser. C) No. 135, (Nov. 22, 2005).

¹⁰² Jo M. Pasqualucci, *Criminal Defamation and the evolution of the doctrine of freedom of expression in international law: comparative jurisprudence of the Inter-American Court of Human Rights*, Vanderbilt Journal of Transnational Law, March 2006.

¹⁰³ *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R., PP 132-35.

¹⁰⁴ *Id.* PP 127-29.

¹⁰⁵ *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, P 104 (Aug. 31, 2004).

¹⁰⁶ *Id.* P 96.

¹⁰⁷ *Id.* P 106. The *Canese* case was decided after the *Herrera Ulloa* case. The Court did not address the issue of the criminalization of crimes against honor in *Herrera Ulloa*. See *Herrera Ulloa*, 2004 Inter-Am. Ct. H.R.

are not a proportionate restriction on freedom of expression in political campaigns. Civil defamation suits must suffice to repair damage to reputations in that context. In *Canese*, a former Paraguayan presidential candidate, Richard Canese, had been convicted of criminal defamation by Paraguayan courts for statements he made about another candidate during the campaign for the presidency of the country.¹⁰⁸ During the campaign, Canese accused the rival candidate of having enriched himself with the assistance of the former dictator of Paraguay.¹⁰⁹ In one newspaper interview he stated that the opposing candidate, Wasmosy, had “passed from bankruptcy to the most spectacular wealth, thanks to the support from the dictator’s family.”¹¹⁰ Wasmosy won the election, becoming the President of Paraguay,¹¹¹ and Canese was subsequently convicted in Paraguayan courts of criminal defamation, sentenced to two months in prison, fined, and permanently prohibited from leaving the country.¹¹² After Canese had lost several domestic appeals, petitioners filed a complaint in his favor with the Commission.¹¹³ The Commission found that the Paraguayan criminal conviction violated the American Convention and recommended to the State that it lift the

¹⁰⁸ Canese, 2004 Inter-Am. Ct. H.R., P 69(7). Canese, an industrial engineer who had researched and written books and articles about the Itaipu hydroelectric power plant, had in earlier years been exiled to Holland for his opposition to the former Paraguayan dictator Alfredo Stroessner. Id. P 69(1)(2). Canese had also filed reports alleging corruption and tax evasion against the company contracted to build the power plant, a company that also had been investigated for corrupt practices by the National Congress of Paraguay. Id. P 69(3).

¹⁰⁹ Id. P 69(7). Canese was a candidate in the 1993 Paraguayan presidential election opposing Juan Carlos Wasmosy, the chairman of the board of the Paraguayan company that had constructed the Itaipu project. Id. P 69(2).

¹¹⁰ Id. P 69(7). Canese alleged that the Stroessner family had allowed Wasmosy to assume the chairmanship of CONEMPA, the consortium that enjoyed a Paraguayan monopoly of the principal civil works of Itaipu. Id. In another interview Canese alleged that “in practice, Mr. Wasmosy was the Stroessner family’s front man in CONEMPA, and the company transferred substantial dividends to the dictator.” Id.

¹¹¹ Id. P 69(8). Other directors of CONEMPA filed a criminal complaint against Canese for defamation. Id. P 69(10).

¹¹² Id. P 2. This restriction that could be lifted only under extraordinary circumstances.

¹¹³ Id. P 5.

sanctions against Canese.¹¹⁴ When the State failed to do so, the Commission referred the case to the Inter-American Court. While the case was pending before the Inter-American Court, the Supreme Court of Justice of Paraguay annulled the judgment against Canese and absolved him of guilt.¹¹⁵ The Inter-American Court subsequently issued a decision holding that Canese's right to freedom of expression as protected by the American Convention had been violated.¹¹⁶ The Inter-American Court held that criminal prosecution for defamation was unduly restrictive for statements made in the context of political campaigns.¹¹⁷

In *Palamara Iribarne*, a former military intelligence officer who had written a State-censored book on military intelligence also had been convicted in a Chilean military court of criminal defamation for comments that he made to the press about the department that was prosecuting his case. Following the seizure of Palamara Iribarne's book the defendant told the press that the office of the Naval Prosecutor “had limited Palamara Iribarne’s freedom of expression and had apparently tried to cover up the repression by accusing him of failure to follow military orders and duties.”¹¹⁸ He also stated that “there were reasons to assume that the Office of the Naval Prosecutor had forged legal documents and lied to the Court of Appeals when it was consulted with respect to who made the complaint that initiated the summary proceeding and the case number so as to avoid an unfavorable decision.”¹¹⁹ The commander of the naval zone filed a complaint against Palamara Iribarne

¹¹⁴ Id. P 10.

¹¹⁵ Id. P 69(49). In annulling the sentences against Canese and absolving him of guilt, the Criminal Chamber of the Supreme Court of Justice of Paraguay stated, the statements made by Mr. Canese--in the political context of an election campaign for the presidency--were, necessarily, important in a democratic society working towards a participative and pluralist power structure, a matter of public interest. There is nothing more important and public than the popular discussion on and subsequent election of the President of the Republic.

Id. P 99 (quoting the Criminal Chamber of the Supreme Court of Justice of Paraguay).

¹¹⁶ Id. P 108.

¹¹⁷ Id. PP 91-92.

¹¹⁸ *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, P 63(73) (Nov. 22, 2005).

¹¹⁹ Id. P 63(73).

for the crime of *desacato* stating that Palamara Iribarne had made his statements “in highly offensive terms with respect to the Naval Prosecutor.”¹²⁰ Although Palamara Iribarne was initially absolved of the crime of defamation before a military tribunal,¹²¹ he was subsequently convicted by another military tribunal and that decision was confirmed by the Chilean Supreme Court.¹²² The case was then brought to the Commission which found in favor of Palamara Iribarne, and it was then referred to the Inter-American Court. Chile informed the Court that it had revised its *desacato* law in civil courts to eliminate the crime of defamation against authorities.¹²³ The State had not, however, eliminated defamation from the Chilean Code of Military Justice.¹²⁴ The Inter-American Court held that Chile had violated Palamara Iribarne's right to freedom of expression because the crime of *desacato* was disproportionate and unnecessary in a democratic society.¹²⁵ The Court stated that the law as applied to Palamara Iribarne “established disproportionate sanctions for criticizing the functioning and members of a State institution,”¹²⁶ in that it “suppressed the essential debate for the functioning of a truly democratic system and unnecessarily restricted the right to freedom of thought and expression.”¹²⁷

Thus, in 2005, the Court had three opportunities to make great strides in the area of criminal defamation.¹²⁸ The Court provided protection of freedom of expression by clarifying that journalists are not required to prove the truth of statements quoted from third

¹²⁰ Id. P 63(74).

¹²¹ Id. P 63(88).

¹²² Id. P 63(91), (93).

¹²³ Id. P 63(101).

¹²⁴ Id.

¹²⁵ Id. P 88.

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ Jo M. Pasqualucci, *Criminal Defamation and the evolution of the doctrine of freedom of expression in international law: comparative jurisprudence of the Inter-American Court of Human Rights*, Vanderbilt Journal of Transnational Law, March 2006.

parties.¹²⁹ The Court also determined that criminal suits for defamation and criminal sanctions are undue restrictions on freedom of expression when the allegedly defamatory statements are made about persons whose activities are within the domain of public interest.¹³⁰

2.5. European Countries' Experiences on Criminal Defamation

The laws of some European countries include some type of defamation or insult provision, but they vary widely in their scope and application. The criminal laws, which may carry sanctions ranging from fines to imprisonment for periods of up to six years, also differ from the American approach in that they generally do not consider truth to be an absolute defense in defamation cases.

In the United Kingdom, although the crime of libel remains “on the books,” it is rarely prosecuted, in part because procedural rules require private plaintiffs to obtain leave of a High Court Judge before proceeding.¹³¹ Civil libel actions continue to provide a remedy for aggrieved individuals. Similarly, in countries such as Denmark, Norway, the Netherlands and Sweden, criminal defamation laws are almost never invoked against the press, whereas Austria, Spain, Greece and Turkey frequently do so.¹³² France, Germany and Italy also retain their criminal defamation laws, but they are usually interpreted narrowly.¹³³ In

¹²⁹ Herrera Ulloa, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, PP 132-135.

¹³⁰ Canese v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, P 106; Palamara Iribarne v. Chile, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, P 88.

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¹³¹ Feigelson, Jeremy and Bierbauer, Erik, “Criminal Defamation: International Reforms Advance Against a Global Danger” at 117 (2002) (available at <http://216.147.196.167/projects/feigelson.pdf>).

¹³² See Yanchukova, *supra* note 1, at 871-875.

¹³³ *Id.*

general, insult laws exist in Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, Portugal, Romania, Spain, Austria, and Sweden.¹³⁴

In general, despite the existing laws that criminalize defamation, it is not applied in practice in the majority western European countries.

2.6. Defamation in Former Soviet Union Countries.

Former Union of Soviet Socialist Republic included free expression provisions in its constitutions.¹³⁵ It had at least in theory, never retreated from a professed belief in the principles of ethnic or racial equality and freedom of expression as guaranteed by the Soviet Constitution.¹³⁶ Of particular importance was article 50 of the former Soviet Union's Constitution which guaranteed freedom of expression.¹³⁷

Today the situation of defamation in the former Soviet Union countries is different than the western European countries. There are a few former Soviet Union countries which abolished their criminal defamation laws, such as Moldova, Ukraine, Estonia and Georgia. In some of those countries the penalties are even more severely enforced than during the Soviet Union. According Elena Yanchukova, some of those countries, such as Belarus, Azerbaijan, Uzbekistan, Kazakhstan, Kyrgyz Republic, Tajikistan and Turkmenistan have shown less progress toward freedom of speech and prosecuted and convicted multiple journalists of criminal libel in recent years. In the remaining former Soviet Republics

¹³⁴ Defamation and "insult" writers react, A report from International PEN's Writers in Prison Committee, Insult Laws in the European Union, October 2007

¹³⁵ R.D. Sacks and SS. Baron, *Libel, Slander and Related Problems*, second edition, 1994.

¹³⁶ Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations*, Martinus Nijhoff Publishers.

¹³⁷ In accordance with the interests of people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations. Exercise of these political freedoms is ensured by putting public buildings, streets, and squares at the disposal of the working people and their organizations, by broad dissemination of information, and by the opportunity to use the press, television, and radio.⁸⁵

namely Russia, Armenia, and Romania, criminal libel prosecutions have been brought, or are pending.¹³⁸

2.7. Criminal Defamation in the Context of European Court of Human Rights (ECtHR)

As it has mentioned in Chapter 1.2, according to Article 10 (2) the European Convention on Human Rights the right to freedom of expression is not an absolute right and can be restricted in particular situations. Especially if there exist hate speeches or other kind of elements which can make incident within the country and the restriction is necessary in the democratic country the Court can accept the restriction. For instance, in the case of *Soulas and others v France*, the Court noted, in particular, that, "when convicting the applicants, the domestic courts had underlined that the terms used in the book were intended to give rise in readers to a feeling of rejection and antagonism, exacerbated by the use of military language, with regard to the communities in question, which were designated as the main enemy, and to lead the book's readers to share the solution recommended by the author, namely a war of ethnic re-conquest. Holding that the grounds put forward in support of the applicants' conviction had been sufficient and relevant, the Court considered that the interference in the latter's right to freedom of expression had been "necessary in a democratic society". It therefore concluded unanimously that there had been no violation of Article 10."¹³⁹

Thus, the ECtHR recognizes that freedom of expression may be limited to protect individual reputations. However, it also stresses that defamation laws, like all restrictions on freedom of expression, must be proportionate to the harm done and not go beyond what is necessary in the particular circumstances. Criminal defamation provisions breach the guarantee of freedom of expression both because less restrictive means, such as the civil

¹³⁸ Yanchukova, *supra* note 1, at 883-891

¹³⁹ ECtHR, *Soulas and others v France*, June 10, 2008, Strasbourg, France.

law, are adequate to redress the harm and because the sanctions they envisage are not proportionate to the harm done.

The Court has narrowed the circumstances where scrutiny of public bodies and figures is defamatory. Over the past decades, the court has decided a string of cases that creates a hierarchy of “acceptable criticism.”¹⁴⁰

Today the Court recognizes that there are serious problems with criminal defamation. It has frequently reiterated the following statement, originally made in a defamation case: “The dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”¹⁴¹

In the very first defamation case before the European Court of Human Rights, the Court considered that even a minor fine was a serious matter: “The penalty imposed on the author... amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future... In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.”¹⁴²

2.7.1. Public officials and public figures

Although the protection of others is taken into consideration in defamation cases, there exists different approach when the main target of defamation is politicians. There are a number of decisions in which the Court has distinguished between private and public

¹⁴⁰ EctHR, *Lingens v Austria*, 1986, Strasbourg, France.

¹⁴¹ EctHR, *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para 46, Strasbourg, France.

¹⁴² EctHR, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, par. 44, Strasbourg, France.

reputations and ruled that the extend to which the latter may be protected is more limited, particularly where the press is acting as ‘watchdog’ on matters of public interest. The leading case of ECtHR in this matter is considered *Lingens v Austria*.¹⁴³ According to the Court, since it was impossible to prove the truth of value judgments, the requirement of the relevant provisions of the Austrian criminal code was impossible of fulfillment and infringed article 10 of the Convention.¹⁴⁴ With this case, the Court thoroughly denounced the idea that public figures such as politicians should receive enhanced protection under defamation law. The Court said: “The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt, Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”¹⁴⁵ The similar position was taken by the court in the case of

¹⁴³ ECtHR, *Lingens v Austria*, 1986, 8 EHRR 407

¹⁴⁴ In this case the applicant had published two articles accusing the Austrian Chancellor, Bruno Kreisky, of protecting and helping former Nazi SS officers for political reasons. Kreisky successfully prosecuted the applicant for an offence of criminal defamation. The court accepted that the protection of his reputation as a politician was a legitimate aim. However, it emphasized that ‘the limits of acceptable criticism’ of a politician in his public life are wider than those applying to private individuals. The court stressed that:

... a politician ... inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 (2) enables the reputation of ... all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of the open discussion of political issues. (see para. 42)

¹⁴⁵ ECtHR, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, par. 42.

Oberschlick v Austria.¹⁴⁶ In another case¹⁴⁷ the Court stated that the media must have greater freedom to attack public servants who abuse their positions as part of their watchdog role.

In *Castells v. Spain*, the ECHR went a step further, establishing an even wider definition of permissible criticism of the government itself.¹⁴⁸ The state had charged Castells, then a senator, with insulting the government in a magazine article about violence in the Basque Country. According to the Spanish criminal code, insulting, falsely accusing, or threatening the government is punishable by imprisonment from six months to twelve years.¹⁴⁹ Finding for Castells, the ECHR said that a democratic government must accept more criticism than private individuals and politicians.¹⁵⁰ Echoing the common law idea that governments cannot have reputations, the court argued governments must not bring actions to protect their honor.¹⁵¹ It distinguished these cases from potentially legitimate prosecutions to protect public order. Although the ECHR did not prohibit government prosecutions, it urged states to show restraint when instituting criminal defamation suits because of their “dominant position” and the need for political criticism.¹⁵²

¹⁴⁶ In this case an editor had run an article reporting a speech of Jorg Heider, leader of the Austrian Liberal Party, under the headline ‘P.S.: “Idiot” instead of Nazi’, which went on to state that this is how we would describe Heider. The speech had praised the Austrian ‘soldiers’ of the Second World War, including those in the SS or Wermacht, for their role as founders of the contemporary, prosperous Austrian democratic state. The applicant was convicted to the Austrian Criminal Code in a private prosecution brought by Heider. In finding a violation, the Court rejected the suggestion that in describing the politician as an ‘idiot’ he had overstepped the mark required for orderly discussion of matters of public interest in a democracy.

¹⁴⁷ ECtHR, *Janowski v Poland*, 1999

¹⁴⁸ ECtHR, *Castells v. Spain*, 1992, Strasbourg, France

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² Id.

2.7.2. Public Interest

As mentioned above, the Court has affirmed the principle of public officials or public figures in several cases and it has become a fundamental tenet of its case law.¹⁵³ The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can be equally relevant when there is an essential public interest regarding the case.¹⁵⁴ For example, the “fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises.”¹⁵⁵

In statements on matters of public interest, the principle applies to public officials and to public servants as well as to politicians.¹⁵⁶ Although in the case of *Janowski v. Poland*, the Court held that public servants must “enjoy public confidence in conditions free of perturbation if they are to be successful in performing their tasks,” this case did not require the Court to balance the interests of freedom of the media against need to protect public servants and, importantly, did not concern statements in the public interest. In the later case of *Dalban v. Romania*, the Court resolutely found a violation of freedom of expression where a journalist had been convicted for defaming the chief executive of a State-owned agricultural company.¹⁵⁷ Regarding the public interest the court stressed: “One factor of particular importance for the Court’s determination of the present case is therefore the

¹⁵³ See, for example, *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30;

Wabl v. Austria, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59.

¹⁵⁴ See Chapter 1.3.6.(g)

¹⁵⁵ EctHR, *Dichand and others v. Austria*, note 14, para. 51.

¹⁵⁶ EctHR, *Janowski v. Poland*, 21 January 1999, Application No. 25716/94, para. 33. See also *Thorgeirson v. Iceland*, note 20.

¹⁵⁷ EctHR, *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.

essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest.”¹⁵⁸

The Court has rejected any distinction between political debate and other matters of public interest, stating that there is “no warrant” for such distinction.¹⁵⁹ The Court has also clarified that this enhanced protection applies even where the person who is attacked is not a ‘public figure’; it is sufficient if the statement relates to a matter of public interest.¹⁶⁰

2.7.3. Facts vs. Opinions

The Court has made it clear that criminal defamation law must distinguish between statements of fact and value judgments.¹⁶¹ This is because the existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof. It follows that: “The requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental part of the right to freedom of expression.”¹⁶²

In a number of cases before the Court, domestic courts had wrongly treated allegedly defamatory publications as statements of fact. For example, in *Feldek v. Slovakia*, the Court disagreed that the use by the applicant of the phrase “fascist past” should be understood as stating the fact that a person had participated in activities propagating particular fascist ideals. It explained that the term was a wide one, capable of encompassing different notions

¹⁵⁸ Id. At para. 49.

¹⁵⁹ EctHR, *Thorgeir Thorgeirson v. Iceland*, note 20, para. 64.

¹⁶⁰ EctHR, *Bladet Tromsø and Stensaas v. Norway*, note 16.

¹⁶¹ See the Chapter 1.3.6.(f)

¹⁶² EctHR, *Dichand and others v. Austria*, note 14, para. 42

as to its content and significance. One of them could be that a person participated as a member in a fascist organization; on this basis, the value-judgment that that person had a ‘fascist past’ could fairly be made.¹⁶³

In the case of *Grinberg v Russia*, the Court noted that: “One factor of particular importance for the Court's determination in the present case is the distinction between statements of fact and value judgments. ... It has been the Court's constant view that, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. ... There has therefore been a violation of Article 10 of the Convention.”¹⁶⁴

2.7.4. The Defense of ‘Reasonable Publication’

It is now becoming widely recognized that in certain circumstances even false, defamatory statements of fact should be protected against criminal liability. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably in publishing a statement on a matter of public concern, while allowing plaintiffs to sue those who have not, what might be termed the defense of reasonable publication. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test. This has been confirmed by the European Court, which has stated that the press should be allowed to publish stories that are in the public interest subject to the proviso that “they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”¹⁶⁵ Applying these principles in the case of *Tromsø and Stensaas v. Norway*, the European Court of Human Rights placed great emphasis on the fact that the statements made in that

¹⁶³ ECtHR, *Feldek v. Slovakia*, 12 July 2001, Application No. 29032/95.

¹⁶⁴ ECtHR, *Grinberg v Russia*, at para. 28-35, July 21, 2005, Strasbourg, France

¹⁶⁵ ECtHR, *Bladet Tromsø and Stensaas v. Norway*, note 16, para 65.

case concerned a matter of great public interest which the plaintiff newspaper had covered overall in a balanced manner.¹⁶⁶

Thus the ECtHR pays huge attention to the defamation cases. It criticizes the criminal defamation and calls States to refrain from punishing the journalists and restricting the freedom of media.

2.7.5. Conclusion

As a result of the comparison of different countries' experiences on criminal defamation it is observed that criminal defamation is not unusual even for many developed countries where human rights are protected properly. However in those countries those laws that criminalize defamation are not applied frequently. In countries such as Norway, Sweden, Denmark, Austria, Belgium, Portugal, Czech Republic, Germany, and Hungary there is no recent successful criminal convictions on defamation. In some other western European countries either the law on criminal defamation is not applied or it is applied but the freedom of expression is protected by supreme or regional courts. As it is mentioned above, the US has a more liberal approach to this issue.

However, there are still states which have very strict approach to defamation cases. Some of former Soviet Union countries are also among those countries. Unfortunately, there are still convictions on defamation in some former Soviet Union countries such as Russia, Azerbaijan, Armenia, Kazakhstan and etc. This situation restricts the freedom of expression in those countries and as a result there is very slow development of democracy.

¹⁶⁶ Id.

CHAPTER III

3.1. Laws of Defamation of the Azerbaijan Republic

The Republic of Azerbaijan (hereinafter Azerbaijan) is located on the western shore of the Caspian Sea and at the southeastern end of the Caucasus Mountains region. Azerbaijan has been independent of the former Union of Soviet Socialist Republics (USSR) since 1991. It has an elected president, a parliament, called the “Milli Majlis” and a judicial system.¹⁶⁷ Azerbaijan’s Constitution was adopted on November 12, 1995.¹⁶⁸

Freedom of expression is protected in the Azerbaijan Constitution: Article 47, “Freedom of thought and speech,” provides that:

- (I) Everyone may enjoy freedom of thought and speech.
- (II) Nobody should be forced to promulgate his/her thoughts and convictions or to renounce his/her thoughts and convictions.
- (III) Propaganda provoking racial, national, religious and social discord and animosity is prohibited.¹⁶⁹

The limitation of free speech stated in Article 47(III) is expanded upon in other Articles. Articles 46, 75 and 106 of the Constitution are the basis for the statutory defamation provisions which have been enacted since 1995 in the Criminal and Civil Codes and then, subsequently, copied into the provisions of the Law on Mass Media enacted in 2001 and the Law on Public TV-Radio Broadcasting 2004.

¹⁶⁷ Azərbaycan Respublikası Konstitusiyası (Constitution), Article 7,

¹⁶⁸ Hugh Poulton, Article 19: Global Campaign for Free Expression, Azerbaijan: Press Freedom or Personal Fiefdom? para. 4.1 (Jan. 2001), at <http://www.article19.org>.

¹⁶⁹ Azərbaycan Respublikası Konstitusiyası, Article 7.

Article 46, “Right to Defend Honor and Dignity,” is the main basis for the statutory defamation provisions. It provides that:

(I) Everyone has the right to defend his/her honor and dignity.

(II) Dignity of a person is protected by the state.

Nothing must lead to the humiliation of dignity of human beings.

(III) Nobody must be subject to tortures and torment, treatment or punishment humiliating the dignity of human beings. Medical, scientific, and other experiments must not be carried out on any person without his/her consent.¹⁷⁰

Article 75 of the Constitution constitutes the respect of state symbols of the Azerbaijan Republic – its banner, state emblem and national anthem (hymn). There is no specific legislative provision implementing this Article of the Constitution.

Article 106 states:¹⁷¹

The President of the Azerbaijan Republic enjoys the right of personal immunity. The honor and dignity of the President of the Azerbaijan Republic are protected by law. Article 106 is implemented in Article 323 of the Criminal Code which criminalises discrediting or degrading the honour and dignity of the President. The penalties are significantly increased if the same deeds are linked with an accusation of a serious crime.¹⁷²

Moreover, there was an amendment to the Constitution in March 2009 which has created challenges for journalists. According to the amendment, “it is prohibited to take a photo, video or record the voice of anyone without first attaining his or her agreement.”¹⁷³ Despite the fact that this amendment was criticized by local and international legal specialists as well as several international organizations, it has nevertheless been implemented. After this amendment it has become more difficult for journalists to fulfill their responsibility by

¹⁷⁰ *Id.* Article 46.

¹⁷¹ *Id.* Article 106.

¹⁷² Criminal Code, Article 323.

¹⁷³ Constitution, Article 32.3

using all possible opportunities because it is a challenge now to take a photo or record voice without permission of a target person and in this way to prepare and deliver comprehensive information. In addition, if a journalist publishes an article regarding any illegal act of any official person and put photos confirming the fact and after publication he is sued in a court for defamation, he can be unable to use those photos in a trial as an evidence to protect himself in case the other party rises the motion that those photos were taken without his permission. In this case the court will not accept those photos as a reliable evidence with accordance to the law¹⁷⁴. Moreover, According to Article 125.4 of CPC, those photos can be used against the journalist as an evidence acquired with a breach of the law. Thus, in this way the State has made extra challenges for journalists.

Freedom of information is also envisaged in the Constitution. Article 50, “Freedom of information,” provides that:

- (I) Everyone is free to look for, acquire, transfer, prepare and distribute information.
- (II) Freedom of the mass media is guaranteed. State censorship in mass media, including press, is prohibited.¹⁷⁵

Article 23 of the Civil Code provides a remedy for the dissemination of information that humiliates a person’s “honor, dignity and business reputation”. A similar provision is envisaged in the Law on Mass Media. The Law on Mass Media applies, with particular force, both general and specific defamation provisions to the media. Almost wholly repeating Article 23 of the Civil Code, Article 10 of the Law on Mass Media prohibits the dissemination of information through the media that humiliates the honor and the dignity of the citizens, or publishing material which constitutes slander.¹⁷⁶ Also, Articles 50 and 53 of the Law on Mass Media place conditions on the privilege of accreditation for both local

¹⁷⁴ See Article 125.2.1 of the Criminal Procedure Code of the Azerbaijan Republic.

¹⁷⁵ Constitution, Article 50.

¹⁷⁶ Law on Mass Media of the Azerbaijan Republic, Article 10

and foreign journalists. Accreditation can be withdrawn if the journalist violates the rules of accreditation, dishonors the body or spreads false information about the body.¹⁷⁷

In addition, according to Article 44 of the Law on Mass Media a person, who is considered that his honor and dignity was humiliated, has a right to demand refutation, correction apology and reply through the media in respect of the published material or to apply to a court.¹⁷⁸ Article 61(1) subjects an editor who refuses to comply with these remedies, without grounds, to unspecified administrative or criminal responsibility. The defences of truth or public interest available to the media under the Law on Mass Media are limited to specific circumstances only under Article 62.¹⁷⁹

Moreover, in March of 2009 there was an amendment to the Law on Mass Media by the Azerbaijani Milli Majlis.¹⁸⁰ According to the amendment to Article 19 of the Law, the media organizations activities have been restricted even more. Now the Law makes courts competent to a media organization which is headed by a chief editor who does not have high education as well as those that have foreign citizenship.¹⁸¹

Similarly, Article 8.8.8 of the Law on Public TV-Radio Broadcasting 2004 requires a public service broadcaster to respect the privacy, honor and dignity of the citizens. A breach of this provision is governed by the provisions of the Law on Mass Media.¹⁸²

The most problematic Law in the term of defamation is the Criminal Code which criminalizes the defamation. Two articles of the Criminal Code are devoted to this matter. Article 147 constitutes slander. It states:

¹⁷⁷ Id., Article 50 and 53

¹⁷⁸ Id., Article 61(1)

¹⁷⁹ Id., Article 62

¹⁸⁰ Azerbaijani Parliament is called Milli Majlis

¹⁸¹ Law on Mass Media of the Azerbaijan Republic, Article 19

¹⁸² Law on Public TV-Radio Broadcasting 2004, Article 32.3.

147.1. Slander is distribution of obviously false information which discredit honor and dignity of any person or undermines his reputation in a public statement, publicly or in mass media shown products

147.2. Slander committed by accusing someone in commission of serious or especially serious crime.

The penalty for the first paragraph is a fine of one hundred up to five hundred of the nominal financial unit, or community services for the term of up to hundred forty hours, or reformatory services for the term of up to one year, or imprisonment for the term of up to six months. The second paragraph envisages more strict punishment such as reformatory services for the term of up to two years, or deprivation of freedom for the term of up to two years, or imprisonment for the term of up to three years.

Article 148 is entitled insult. It states:

An Insult is a deliberate humiliation of honor and dignity of a person, expressed in an indecent form in the public statement, publicly or in mass media shown product. The penalty is the same for the first paragraph of Article 147. In practice, these articles are implemented quite frequently.

Despite the slander and insult provisions, there is no law on defamation as such. Although international organizations like the Organization for Security and Cooperation in Europe (hereinafter OSCE) and local NGOs worked on a draft law on defamation and submitted it to the Parliament. The draft Law contained many provisions which sought to ensure respect for the right to freedom of expression while maintaining protection for reputations. In addition to abolishing the criminal defamation provisions, the draft Law prohibited public bodies from bringing defamation cases, largely limited the scope of defamation to false statements of fact, provided for strong defences against a defamation claim and set out a progressive regime of remedies for defamatory statements. In some cases, the draft Law actually provided far-reaching protection for defamatory statements, for example providing

absolute protection for repeating statements made in other media or by NGOs, and even in some cases by individuals.¹⁸³ This draft law was not accepted.

3.2. Mass Media in Azerbaijan

The number of newspapers in Azerbaijan is currently no more than 180-200 papers. According to their political status, the newspapers could be divided into governmental, pro-governmental, oppositional and independent ones. The independent newspapers total about 0.6%, oppositional – 4%, governmental and pro-governmental - 95.4%. The newspapers are mostly spread in the capital – Baku, much less in big cities like Sumgayit and Ganja. A small segment is observed in district centers. The newspapers practically do not reach the villages. The oppositional press is mostly spread in Baku and Sumgayit.¹⁸⁴

The television was and remains a basic information source for the population. It comprises 98% of information distribution. There is one state, one public and 4 private TV and radio companies (one more was added on September 14 of 2007) among those that inform the whole country. Six regional TV and radio companies operate within the country. The cable broadcasting companies only retransmit the telecasts of the local and foreign TV channels. Despite the various forms of property, all the TV and Radio companies are under the political and financial control of the executive power.¹⁸⁵

There were 11 national radio broadcasters, as well as the BBC, Voice of America, and Radio Free Europe/Radio Liberty, all three of which were banned from FM radio by the government at the end of 2008. International organizations criticized this act and tried to

¹⁸³ Article 19, Memorandum on the Law of the Republic of Azerbaijan on Defamation, London, 2006.

¹⁸⁴ Leyla Yunus, Freedom of word and mass media in Azerbaijan, September 21 2007, Baku, Azerbaijan

¹⁸⁵ Id.

negotiate with the government but there is still no result. It has had a negative influence and today there is no independent media in the country¹⁸⁶

3.3. Attacks against Journalists

Since 2005, several journalists have been imprisoned on dubious charges in what has been widely criticized as a campaign against the independent Mass Media. The majority of them have been convicted on articles 147 (slander) and 148 (insult) of the Criminal Code.¹⁸⁷

For instance, in 2006 the prominent political satirist Mirza Zahidov (also known as Mirza Sakit) was convicted for drug possession. In 2007 the editor in chief of 'Realny Azerbaijan' and 'Gundelik Azerbaijan' newspapers Eynulla Fatullayev was sentenced to eight-and-a-half years of imprisonment on charges of supporting terrorism, inciting ethnic hatred, and tax evasion. In 2008 Ganimat Zahid, editor in chief of opposition newspaper of Azadliq, was sentenced to four years' imprisonment.¹⁸⁸ And several similar cases happened.

In addition to criminal prosecutions, many journalists have received ominous communiqués that threaten murder and/or physical attack. The first actual attack was on March 2, 2005 with Elmar Huseynov, the senior editor of the popular weekly edition Monitor, who was killed at the entrance of his own house. Huseynov's case was considered by the officials to be "a terrorist act" and his assailants have not been arrested. After this dramatic crime, other journalists were harmed in various ways. Some were kidnapped, others beaten, etc. All those journalists were in opposition to the government.¹⁸⁹

¹⁸⁶ See Reports at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119068.htm>;

http://www.rferl.org/content/US_and_EU_Oppose_Azeri_Plans_to_Drop_Radios/1339210.html

¹⁸⁷ Leyla Yunus, Freedom of word and mass media in Azerbaijan, September 21 2007, Baku, Azerbaijan

¹⁸⁸ <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119068.htm>

¹⁸⁹ Leyla Yunus, Freedom of word and mass media in Azerbaijan, September 21 2007, Baku, Azerbaijan

Considering the media's essential role in a democratic society, it is vital that it be permitted to gather and disseminate diverse information and opinions and that its ability to do so is protected by the government. Democracy is essential to the defense of human rights, and freedom of the press is essential to the maintenance of a democracy. Where journalists who critically report on public affairs or governmental activities are harassed, imprisoned, or murdered, the government is not only intimidating or eliminating the targeted journalists, but also attempting to intimidate anyone who might consider investigating and reporting on governmental corruption, human rights abuses, or other wrongdoing. These kinds of activities against media violate the fundamental rights of individuals and strongly restrict freedom of expression.¹⁹⁰

When the State is not successful in protecting journalists, it must investigate attacks against journalists and prosecute the perpetrators of the crimes. According to international Conventions such as ICCPR and ECHR, a state has an obligation to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.¹⁹¹ Moreover, a State's obligation to investigate these crimes must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. The State must punish the organizers of the violation as well as the individuals who carried it out, whether or not the perpetrators of the threats or violence are state agents. Punishment will operate as a force against impunity by acting as both a specific and a general deterrent. The State must use all legal means to combat impunity because impunity for those who violate the rights of journalists and the media encourages others who may commit similar abuses. Unfortunately, it is very usual for the Azerbaijan's experience. It has been four years since Elmar Huseynov was brutally killed and there is no result of investigations and the perpetrators are still free. As a result of this impunity many harassments, kidnappings, dubious arrests and imprisonments, and other brutal crimes have been committed against journalists and other authors from the opposition.

¹⁹⁰ See Article 19th press release of July 13, 2009 on Azerbaijan: Article 19 Deplores Harassment of Internet Journalists.

¹⁹¹ See cases of *Herrera Rubio v Colombia*, 161/83, HRC; *Delgado Paez v Colombia*, 195/85, HRC.

One of the last cases was the arrest of two young internet bloggers, Emin Milli and Adnan Hajizade who were very active on internet and criticized the government's policy over democracy, human rights, etc. In July 2009, they were beaten in the restaurant by two people and when they went to a police office to complain, they were arrested with an accusation of hooliganism. The case was considered in a first instance court and Emin Milli was sentenced to two-and-a-half years and Adnan Hajizade two years of imprisonment. All civil society, including international organizations such as the CoE, the OSCE, the Human Rights Watch, the Amnesty International, Article 19 as well as several countries such as the US, Germany, Norway etc. criticized this act of government and asked for the immediate release of young bloggers from the Azerbaijani Government, there has been no result. According to local NGOs' and international organizations' reports, there was no evidence in the case proving bloggers' guilt and it proved that they were arrested for their oppositional public activity.¹⁹²

So, the last event reproved that the Azerbaijani government is ready to arrest anyone, including young intellectual people, in order to restrict the free expression.

3.4. Attacks to Newspapers, independent TV channels and radios

Government entities have been responsible for a concerted campaign to eliminate state criticism from the media. On November 24, 2006 the following Mass Media and journalist organizations were forcefully removed from the building which belonged to the editorial office of the "Azadliq newspaper": the newspaper "Azadliq", "Bizim Yol", Informational Agency of TURAN, the union of journalists called "Yeni Nesil". The act was implemented with the decision of the court on the lawsuit of the Executive Power of the Baku city. The

¹⁹² See: <http://www.article19.org/pdfs/letters/azerbaijan-letter-regarding-emin-milli-and-adnan-hajizade.pdf>, [https://wcd.coe.int/ViewDoc.jsp?Ref=PR839\(2009\)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE](https://wcd.coe.int/ViewDoc.jsp?Ref=PR839(2009)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE), <http://www.state.gov/r/pa/prs/ps/2009/nov/131798.htm>

removal was conducted immediately after (within an hour) the announcement by the first instance court to conduct the raid which was against law.

The attempt of the private TV and Radio Company ANS to operate independently was unsuccessful. The operation of this company was halted in 2006. The justification of the State was the licensing of the broadcaster. The government stated that validity period of the broadcast license had expired. However, the same time limit applied to the other TV channels, but the same rule was not applied to those channels. The operation was recommenced after tedious negotiations with the participation of western intermediaries. The oppositional representatives disappeared from the TV and Radio air of ANS over the past months and criticism concerning the highest ranks was softened.¹⁹³

On December 30 2008, the National Television and Radio Council (NTRC) began prohibiting broadcasts of Voice of America, Radio Liberty, and the BBC on national television and FM radio frequencies. The NTRC also closed Russian-owned Europa Plus, which played mostly pop music. Without these international broadcasters on national television and FM radio frequencies, the public no longer had access to unbiased news through any widely accessible broadcast media.¹⁹⁴ Despite numerous negotiations between the Council of Europe, the US State Department, Organization for Security and Cooperation in Europe, European Union and other international organizations and the Azerbaijani government, the broadcasting of the radio stations has not been restored. It has strictly restricted access to the independent media.

However, the State has an obligation to develop pluralism and the free flow of information and ideas to the public. The main way of this is the independent media. This obligation makes states to refrain from interference of broadcasters' freedom of expression. Although licensing of broadcasters is necessary to ensure the orderly use of the airwaves, licensing

¹⁹³ See Article 19th press release of July 13, 2009 on Azerbaijan: Article 19 Deplores Harassment of Internet Journalists.

¹⁹⁴ The US Department of State's Report on Azerbaijan, 2008 (available at: <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119068.htm>)

procedures are governed by the guarantee of freedom of expression and they may not, as a result, be used as a vehicle for government control over broadcasters, including state-funded broadcasters.

The bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of state-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments.

Several Declarations adopted under the auspices of UNESCO note the importance of independent public service broadcasting organisations. The 1996 *Declaration of Sana'a* calls on the international community to provide assistance to state-funded broadcasters only where they are independent and calls on individual States to guarantee such independence. The 1997 *Declaration of Sofia* notes the need for state-owned broadcasters to be transformed into proper public service broadcasting organisations with guaranteed editorial independence and independent supervisory bodies.

One of the most important documents on this matter is Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*, passed by the Committee of Ministers of the Council of Europe. The very name of this Recommendation clearly illustrates the importance to be attached to the independence of public service broadcasting organisations. The Recommendation notes that the powers of supervisory or governing bodies should be clearly set out in the legislation and these bodies should not have the right to interfere with programming matters. Governing bodies should be established in a manner which minimizes the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest.

3.5. Court's experience on defamation

As mentioned above there are huge problems in the field of freedom of expression and independent mass media in the country. One of the main reasons of this problem is that there is no independent judicial system in the country.¹⁹⁵ Despite the fact that judges are selected for life, the selection/interview process of judges as well as punishment and award processes of judges are implemented by the Judicial Legal Council (hereinafter the JLC). The head of the JLC is the Ministry of Justice which is the part of executive power.¹⁹⁶ Therefore, judges are not absolutely independent from the executive power. As majority of plaintiffs in defamation cases are the officials of the executive power, their claims are satisfied in the most of cases.¹⁹⁷

One of the most problematic issues in the courts' experiences is that main elements of defamation are not investigated and taken into consideration during trial investigation. Especially important matters like public interest, public officials as plaintiffs, necessity in a democratic society, and proportionality have no attention paid to them.

3.5.1. The matter of public interest.

In many cases, the article in question which led to a defamation case drew a huge public interest. However, courts did not pay attention to this matter and in many cases judges did not even discuss the public interest issue.

For instance, in the case of *Ministry of Defence v "Azadliq"* newspaper, the article that was considered defamatory, discussed the issue of lack of food and hard circumstances in the military in Azerbaijan. This issue drew significant public interest. However the court did not touch upon this matter and fined the "Azadliq" newspaper for 10.000 AZN (11.900

¹⁹⁵ See 2008 report of US State Department on Azerbaijan

¹⁹⁶ See the Law of the Azerbaijan republic on Courts and Judges.

¹⁹⁷ Leyla Yunus, Freedom of word and mass media in Azerbaijan, September 21 2007, Baku, Azerbaijan

Euros).¹⁹⁸

In the other case of *Heydar Babayev (Minister of Economic Development) v “Azadliq” newspaper*, the article was about the participation of Azerbaijani high-ranking officials at the wedding of two very well-known people – Metyu Braiza, the representative of the US in the South Caucasus and Zeyno Baran. The article was about how the Azerbaijani officials financially supported the wedding of Mr. Braiza and Mrs. Baran. There was a huge public interest regarding this case. Again public interest was not taken into account. In addition the court did not conduct any investigation to determine if the information was true or not. Mr. Babayev’s claim was satisfied by the court and obliging the newspaper to refute.

Since Azerbaijan has ratified the ECHR in 2002 there are only a limited number of judgments on Azerbaijan from the European Court of Human rights. Only one of them is on defamation, with the Court recognizing a violation of Article 10 (freedom of expression) of the Convention. This case was of *Mahmudov and Agazade v. Azerbaijan*.¹⁹⁹ In its holding, the European Court emphasized the public interest issue.²⁰⁰

The Court noted that the article discussed a number of issues concerning the current problems in the agricultural sector. As such, the subject matter of the article constituted a matter of general interest. As a result, the European Court held that the article did not

¹⁹⁸ *Ministry of Defence v “Azadliq”*.

¹⁹⁹ ECtHR, *Mahmudov and Agazade v. Azerbaijan*, December 18, 2008, Strasbourg, France

²⁰⁰ In *Mahmudov and Agazade v. Azerbaijan* the applicants were the editor and a journalist for the newspaper, Muxalifat. In April 2003 the newspaper published an article entitled “Grain Mafia in Azerbaijan” under a pseudonym of the second applicant. The article was accompanied by a picture of J.A., who was a member of the National Academy of Sciences, a well-known expert in agriculture, and a member of the Azerbaijani Parliament. The article generally spoke about a number of problems in the country's agricultural sector. It also appeared to imply, among other things, that J.A. was in charge of certain experimental crops in several agricultural regions. J.A. filed a criminal complaint. The national court convicted the applicants of defamation and insult and sentenced each applicant to five months’ imprisonment and, at the same time, exempted them from serving their sentences.

constitute defamation.

Despite the case by the European Court, Azerbaijani Courts continue to ignore the issue of public interest and, in so doing, violates Article 19 of the ICCPR and Article 10 of the ECHR.

3.5.2. Fact or opinion

As mentioned above, it is very important to differentiate fact from opinion.²⁰¹

Differentiation of these two elements is decisive in a defamation case. Unfortunately, the national courts do not take into consideration if the statement is a fact or value judgment, and if the fact is true or false.

The case of *Zardusht Alizade* involved one of the leaders of a democratic and anti-communist movement in Azerbaijan. The defendant had published an article where he referred to certain alleged crimes committed by officials of the Ministry of Internal Affairs,²⁰² as well as other negative cases within the Ministry and called this Ministry a “crime nest”. The domestic court on the first instance partially satisfied the plaintiff’s claim without justifying how the statement damaged the plaintiff’s honor and dignity. Both the appeal and supreme courts agreed with the judgment of the first instance court.

In this case, to have satisfied international Human Rights standards the court should have taken into consideration that the defendant referred to the criminal case of the officials of the Ministry of Internal Affairs which made a huge resonance in the country and all crimes committed by that criminal enterprise were, in fact, proven in court. Moreover, in referring

²⁰¹ See Chapter 1.3.6(f)

²⁰² He mainly stated the case of *Haji Mammadov and others*. In that case Haji Mammadov was the head of the department of investigation of grave crimes of Ministry of Internal Affairs. He and other people under his authority committed some grave crimes such as murder, kidnapping, theft and etc. during ten years and they were arrested only after ten years.

to these negative matters the author had merely stated his own opinion on negative acts and criminality of the Ministry.

Another case where the court did not take into consideration the differences between fact and value judgments was the case of *Rafiq Tagizade and Samir Sadagatoglu*. On 1 November 2006, a small Azerbaijan newspaper, *Sanat*, published an article entitled 'Europe and Us' comparing European and Islamic traditions in which it was suggested that Islam had hindered progress in the development of Muslim states such as Azerbaijan. The main point of the article constituted the author's opinion on two religions which alleged Christianity superior to Islam. This article led to outrage among Muslim conservative groups and the subsequent arrest of the newspaper's editor Samir Sadagatoglu, and the author of the article, Rafiq Tagi (also referred to as Taghizade). They were charged with Article 283 of the Criminal Code, inciting national, racial and religious enmity. The decision of the Court was a violation of Tagizadeh's and Sadagatoglu's rights to freedom of expression. First of all, the court did not take into account a very important issue that all statements made in the article were the opinion of Tagizade.

In the *Lingens case*, the European Court of Human Rights ruled that Austrian courts violated the European Convention's provision on freedom of expression when these courts held that value judgments and personal opinions were defamatory under domestic law. In that case, an Austrian journalist had been convicted in the domestic courts for using the expressions "the basest opportunism," "immoral," and "undignified" in reference to the Chancellor of Austria.²⁰³ The European Court of Human Rights found that the statements were not defamatory, reasoning that "a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, but the truth of value-judgments is not susceptible of proof."

²⁰³ ECtHR, *Lingens v. Austria*, App. No. 9815/82, 8 Eur. H.R. Rep. 407, PP 22, 45 (1986).

Moreover, the arrest and imprisonment of the newspaper's editor was not acceptable because he was on vacation when the article was published. Even if he was in his office he should not have been involved in the process. In *Lionarakis v. Greece*,²⁰⁴ the European Court stressed that the Greek decision holding the journalist and coordinator of a radio program liable for the statements of a speaker intervening during his program was in breach of freedom of expression.²⁰⁵

A comparison of the international standards to Azerbaijani practice demonstrates that the domestic courts are not in compliance with Human rights obligations by allowing defamation proceedings based on personal opinion statements.

3.5.3. Public official or public figure.

In Azerbaijan almost in all defamation cases against journalists and other authors involved plaintiffs who were public officials. This includes to all above mentioned cases. These governmental officials include Minister of Internal Affairs, Ministry of Defense, Head of Baku Executive Power, officer of municipality, etc.²⁰⁶ However, this status of plaintiffs has had no effect on the court's evaluations of the cases. In almost all of these cases the plaintiffs prevailed.

²⁰⁴ ECtHR, *Leonarakis v Greece*, June 5, 2007, Strasbourg, France

²⁰⁵ Mr. Lionarakis was a journalist, coordinator and presenter of a radio programme on politics broadcast live on public radio ERT. In 1999, during a debate on Greek foreign policy, a speaker criticised certain public personalities. Mr Lionarakis was held liable for insult and defamation on the ground that, as the coordinator of the programme, he should have prevented or at least interrupted the expression of the controversial statements. He had to pay a fine of over 41,000 euros. The European Court of Human Rights held unanimously that there had been a violation of article 10 (freedom of expression) of the European Convention of Human Rights. It considered that the journalist and coordinator of a live programme on politics could not be held liable in the same way than the person who had made the defamatory statement. The Court also criticized the minimum threshold for compensation contained in the Greek law.

²⁰⁶ Id.

This issue was stressed by the ECtHR in the case of *Agazade v Azerbaijan* as well.²⁰⁷ The Court pointed out that: “the article contained assertions relating directly to J.A.,²⁰⁸ whose full name was mentioned once in the article and whose picture accompanied it. The article also made an indirect reference to J.A. by the phrase “the certain known person”. It is sufficiently clear from the article’s context that the latter phrase also referred to J.A. In view of the fact that J.A. was a prominent politician and scientist, the Court reiterates that the limits of acceptable criticism are wider as regards a public figure, such as a politician, than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance.”

Despite this decision of the ECtHR over Azerbaijan, unfortunately, still public figures win cases on defamation against journalists in courts.

3.5.4. Proportionality and necessity in a democratic society.

In many defamation cases the defendants have been imprisoned. For instance, in the case of *Eynulla Fetullayev, Rafiq Tagi, Samir Sadagatoglu* journalists were imprisoned and some of them remain in custody. However, as mentioned above,²⁰⁹ it was emphasized by the international courts several times that this penalty is not proportional and necessary in a democratic society. Imprisonment is a huge threat to the freedom of expression. It endangers free media and is a negative influence on independent journalism.

In the case of *Eynulla Fatullayev*, the outspoken founder and the editor-in-chief of two newspapers—*Realny Azerbaijan* and *Gundelik Azerbaijan*—was sentenced to two-and-a-half years in prison on charges of libel and insult for an internet posting blaming Azerbaijanis for a 1992 massacre in Nagorno-Karabakh. Fatullayev denied writing the

²⁰⁷ ECtHR, *Mahmudov and Agazade v. Azerbaijan*, December 18, 2008, Strasbourg, France

²⁰⁸ J.A. was a plaintiff who was a parliamentarian and the president’s uncle.

²⁰⁹ See Chapter 1.2.

posting. In 2007, Azerbaijan's Ministry of National Security pressed additional charges against him for terrorism and inciting religious and ethnic hatred for articles printed in *Realny Azerbaijan*. Further, tax evasion charges were filed against him. Both newspapers, which had the largest circulations among print outlets in the country, were effectively shut down after Emergency Ministry and National Security Ministry personnel evicted staff from the papers' premises, confiscated computer hard drives, and sealed the office shut.²¹⁰

As discussed above²¹¹ the right to freedom of expression is not an absolute right and it can be restricted in some circumstances such as the protection of national security, or of public order, or of public health or morals, etc. However the principals of proportionality and necessity in a democratic society are important points and need to be taken into consideration. Even when courts find the defendant guilty of defamation, they should recognize that the imposition of sanctions can have a dangerous chilling effect on freedom of expression.

The ECHR also allows for restrictions "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals"²¹² Similarly, the ICCPR permits restrictions "for the protection of national security, or of public order, or of public health or morals."²¹³ The European Court of Human Rights and the UNHRC have developed jurisprudence to determine whether interference with freedom of expression is justified on grounds concerning national security and related factors.²¹⁴ The jurisprudence of both bodies incorporates the same three elements set forth in the jurisprudence of the Inter-American Court when it considers the legitimacy of any restriction on freedom of expression.

²¹⁰ [Human Rights Watch World Report 2008](http://faliyev.org/en/news/show/785), available in <http://faliyev.org/en/news/show/785>

²¹¹ See Chapter 1.2

²¹² European Convention, *supra* note 37, art. 10(2).

²¹³ ICCPR, *supra* note 37, art. 19(3)(b).

²¹⁴ ECtHR, *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3, P 134; *Kim v. Republic of Korea*, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess. (Jan. 4, 1999).

Enforcement bodies have focused largely on the third element of the “necessity” of the restriction when holding that the restriction contravened the State's obligations under international law.²¹⁵ National security laws are often drafted in broad and unspecific terms which could allow for State enforcement for any speech or activity which criticizes or can be viewed as threatening to the government in power.²¹⁶ These laws, when used to stifle dissent, may serve as effective tools to muffle criticism of governmental policies and to subvert democracy.

The international enforcement bodies that oversee State compliance with human rights treaties must carefully scrutinize State arguments that an interference with freedom of expression is justified by such laws. When a State defends its interference with freedom of expression on national security grounds, the State should be required to “specify the precise nature of the threat allegedly posed by the author’s exercise of freedom of expression.”²¹⁷ The State is also required to explain specifically why the interference is necessary to protect national security or public order.²¹⁸

State reliance on these grounds must be carefully scrutinized. When Turkey attempted to justify its interference with journalists’ rights to freedom of expression on national security grounds, the European Court of Human Rights resolved the journalists’ complaints against the State by applying the reasoning in the above-mentioned paragraph.²¹⁹ In *Halis v. Turkey* the Turkish government had imprisoned a journalist for publishing a book review that expressed positive opinions about aspects of the Kurdish separatist movement. The journalist was convicted domestically of violating the Turkish Prevention of Terrorism Act

²¹⁵ ECtHR, *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3, PP 9-12.

²¹⁶ Susan Marks & Andrew Clapham, *International Human Rights Lexicon* 243 (2005).

²¹⁷ *Kim v. Republic of Korea*, U.N. Human Rights Commission, CPR/C/64/D/574/1994, 64th Sess., P 12.5 (Jan. 4, 1999).

²¹⁸ *Id*

²¹⁹ ECtHR, *Halis v. Turkey*, 2005 Eur. Ct. H.R. 3; *Sener v. Turkey*, 2000 Eur. Ct. H.R. 377.

through the dissemination of propaganda about an illegal separatist terrorist organization.²²⁰ When the journalist filed a complaint with the European Court of Human Rights, the State defended that its restriction was necessary to protect national security. The Court found that the restriction was made pursuant to Turkish law and that in view of the sensitive security situation and the use of violence by a separatist movement in Turkey, the measures taken by the government had the legitimate aim of protecting national security and public safety.²²¹ The Court did not find, however, that the conviction and suspended sentence of the journalist were proportionate to the interference with his freedom of expression.²²² Thus, the European Court of Human Rights held that the restriction was not necessary in a democratic society and that it, therefore, violated the journalist's right to freedom of expression.

Similarly, in *Sener v. Turkey*, before the European Court of Human Rights, the owner and editor of a weekly Turkish paper was convicted of "disseminating propaganda against the State" for publishing an article that referred to the military attacks on the Kurdish population as genocide.²²³ Turkey again defended its interference with freedom of speech on national security grounds because, in its view, merely by speaking negatively of the violence against the Kurdish population, the applicant had "incited and encouraged violence against the State."²²⁴ The European Court of Human Rights held that the State had violated the applicant's right to freedom of expression because the conviction of the editor was not proportionate to the interference with his freedom of expression.

²²⁰ Id. PP 13-15, 17.

²²¹ Id. PP 26-27.

²²² Id. PP 33, 37-39.

²²³ *Sener*, 2000 Eur. Ct. H.R. 377, PP 7-8. 39 VNJTL 379 Page 36 39 Vand. J. Transnat'l L. 379 © 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

²²⁴ Id. P 37.

Returning to the case of *Agazade v Azerbaijan*,²²⁵ the ECtHR also stressed that sentence of imprisonment had contravened the principle that the press had to be able to perform the role of a public watchdog in a democratic society.²²⁶ The Court also held that the criminal sanction imposed on the applicants had amounted to a disproportionate interference with their freedom of expression and, in breach of Article 10, could not be regarded as “necessary in a democratic society”.²²⁷

The U.N. Human Rights Committee regularly criticizes states for maintaining penal sanctions. Since 1994, it has expressed concern about the possibility of custodial sanctions in different countries.²²⁸ For instance, it held that South Korea had contravened the ICCPR’s provision on freedom of expression when it convicted and imprisoned a South Korean activist for criticizing the government of South Korea and advocating national reunification.²²⁹ The government had convicted the complainant of violating its National Security Law.²³⁰

In addition, in many defamation cases in Azerbaijan, journalists and media institutions were imposed with large fines. For instance, in one of the cases of “Azadliq” newspaper, the compulsory payment was 1000 AZN (1190 Euro), in the other case of “Azadliq” newspaper the compulsory payment was 20.000 AZN (23.800 Euro). Again in another case against “Azadliq” newspaper the amount of compulsory payment was 5.000 AZN (5620 Euro). In the case of the newspaper “Yeni Musavat” and its employees Rey Karimoglu and Sabuhi Mammadli, the amount of ordered compensation was 2.000 AZN (2380 Euro). In

²²⁵ ECtHR, *Mahmudov and Agazade v. Azerbaijan*, December 18, 2008, Strasbourg, France

²²⁶ Id.

²²⁷ Id.

²²⁸ See memorandum from ARTICLE 19/INTERIGHTS to the Centre for Human Rights and Legal Aid 10–11 (Feb. 9, 1999) (on file with the author). This memorandum concerns the legitimacy of custodial sanctions for defamation under international human rights norms.

²²⁹ *Kim v. Republic of Korea*, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess., P 2.1-2.3, 12.5 (Jan. 4, 1999).

²³⁰ Id. P 2.3.

the case of Eynulla Fatullayev the amount was 20.000 AZN (23800 Euro). Similar examples are numerous.

All of these fines were charged not for material damage, but for assumed moral damage. The reason and the amount of the fines was not articulated in any of the case. In most cases, courts didn't even take into the account whether the fined journalists and media institutions were able to pay this amount or to what extent this high amount of fine could damage their normal work.

This also was not proportional and necessary in a democratic society.

The failure of Azerbaijani courts to uphold internationally accepted human rights standards with regard to defamation has substantially degraded the enjoyment of free expression, especially the ability of the media to fulfill the population's freedom to information.

4. Conclusion

As discussed at the beginning of the paper, criminal defamation exists in many countries. Some countries do not put into practice this law, while others do. Criminalization of defamation presents a huge challenge for the freedom of expression. As freedom of expression is one of the most important rights for the development of democracy in any society, this right must be protected. Therefore, criminal defamation has been widely condemned by international opinion all over the world. Particularly the common premise is that defamation should not be a criminal offence because jailing journalists has a chilling effect on free speech.

Criminal defamation is not a justifiable restriction on freedom of expression. The practice shows that in many countries governments use the criminal defamation to restrict free media and keep all situations under control by punishing journalists and other authors. In these countries, criminal defamation starts working when any criticism is made of the government or its policy, or corruption, or critique of internal or foreign policy of the government, etc. However, journalists have a right to express their opinions and provide society with different facts. In addition, the population of a country has the right to receive independent and transparent information from the media. By criminalizing defamation and arresting journalists, a state violates both sides' rights. As a result, democracy is harmed.

Unfortunately, this negative practice can be observed in Azerbaijan today. The Azerbaijani government should be realistic in this regard and recognize the importance of the right to freedom of expression of journalists and non-journalists. It should also take into account that criminal defamation laws intimidate individuals from exposing wrongdoing by public officials and such laws are therefore incompatible with the freedom of expression.

In order to comply with international standards, the Azerbaijani government should take the necessary steps to improve the freedom of expression. First of all, criminal defamation law should be abolished and a civil defamation law should be adopted. It is well established

that the guarantee of freedom of expression requires States to use the least restrictive effective remedy to secure the legitimate aim sought. This flows directly from the need for any restrictions to be ‘necessary’; if a less restrictive remedy is effective, the more restrictive one cannot be ‘necessary’. In its judgment in *Castells v. Spain*, the European Court struck down a criminal defamation provision, stressing that restraint should be used in resorting to the criminal law, “*particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media*”.²³¹ The Inter-American Court of Human Rights has put the matter even more clearly: “*If there are various options to achieve a compelling governmental interest, the one that least restricts the right protected must be selected.*”²³² So, as civil defamation laws have been effective throughout the rest of the world, there is no justification for criminal defamation laws.

Although decriminalization is important, it does not resolve all problems. Political will in this regard is also important. The State should be interested in the protection of free expression and its implementation mechanism. If there is a political will, it is possible to have free expression even with the criminal defamation on books, as is the case in the aforementioned European countries as well as the United States. There are criminal defamation laws in these countries that either are not applied in practice or are applied very rarely. If the Azerbaijani government were eager to improve the democracy in the country, it would adopt this restrictive approach.

Another important step that the Azerbaijani government should take concerns the issue of arrested journalists. In this regard, the State should reconsider these cases and free all journalists who were imprisoned for defamation. Prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practice journalism or any other profession, excessive fines and other harsh criminal

²³¹ ECtHR, *Castells v. Spain*, note 21, para 46, Strasbourg, France.

²³² *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 46.

penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement. The government must realize that the objective is democracy, not retribution for alleged damage to reputation.

The final important change needed is the abolition of impunity. In order to protect journalists and stop crimes against them, the State must find and prosecute the perpetrators of the murder of Elmar Huseynov, the editor of the journal of "Monitor". Other perpetrators of various crimes against journalists should be punished as well. Otherwise danger against journalists and free expression will continue. Threats against independent media, TV, radio channels, newspapers, and magazines should be stopped. Only in this way will democracy be established in the country.

International standards for freedom of expression and the issue of defamation have demonstrated that a tolerant line between expression and defamation leads to a functional democracy. Only when Azerbaijan adopts these standards will the government enable the country to proceed toward truly free expression and, with it, a truly democratic country.

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